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Supreme Court of the United States

OCTOBER TERM, 1965

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MASTRO PLASTICS CORPORATION and FRENCH AMERICAN REEDS MANUFACTURING COMPANY, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Citations to Opinions Below and to Prior Opinion of This Court	1
Jurisdiction	2
Questions Presented	3
Statutes, Rules and Constitutional Provisions Involved	4
Statement of the Case	7
I. The burden of proof as to earnings	7
II. The burden of proof as to claimant availability	13
III. The due process issue	15
Reasons for Granting the Writ	18
I. The Burden of Proof Issue—Earnings	18
II. The Burden of Proof Issue—Claimant Availability	28
III. Due Process	30
Conclusion	37
APPENDIX:	
A. Decree Below	38
B. Opinion Below	42
C. Prior Opinion of This Court—Majority	60
Prior Opinion of This Court—Dissent	78

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Petitioners respectfully pray that a writ of certiorari issue to review a decree of the United States Court of Appeals for the Second Circuit dated and entered January 5, 1966 enforcing against them two supplemental orders of the National Labor Relations Board which grant awards of back pay, entered upon Respondent's petition for enforcement and Petitioner's petition for review.

Citations to Opinions Below and to Prior Opinion of This Court

The (first) Supplemental Decision and Order of the Board is reported at 136 NLRB 1342, and is printed in the Appendix for Petitioners used in the Court below (copies

submitted with this Petition*) at pages 6a-22a; the Intermediate Report of the Trial Examiner, to which this Order relates, is also printed in the Appendix used below at pages 23a-128a.

The Second Supplemental Decision and Order of the Board is reported at 145 NLRB 1710, and is printed in the Appendix used below at pages 135a-138a; the Supplemental Decision of the Trial Examiner, to which this Order relates, is also printed in the Appendix used below at pages 139a-151a.

The Decree of the Court of Appeals to which this Petition relates is printed in Appendix A attached, page 38. The opinion of the Court of Appeals underlying the Decree is printed in Appendix B attached, and is reported at 354 F.2d 170.

A prior opinion of this Court in this case is reported at 350 U. S. 270, dissent at 289. While the majority opinion was concerned with the substantive liability of Petitioners for unfair labor practices, a portion of it relating to the present ancillary back pay proceeding is drawn into question at this time, and both majority and dissenting opinions are printed in Appendix C attached.

Jurisdiction

The Supplemental Decree of the Court of Appeals was entered on January 5, 1966. By order of Mr. Justice Harlan, dated March 29, 1966, Petitioners' time to file a Petition for a Writ of Certiorari was extended to April 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

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* Hereafter cited by page number followed by lower case "a".

Questions Presented

1. Whether, in proceedings under a decree enforcing an order of the National Labor Relations Board providing for reinstatement of strikers conditioned upon the availability of work in appropriate job classifications and for back pay measured by a sum equal to that which the employees would normally have earned, the Board may absolve itself from proving the constructive earnings of the several strikers by casting upon the employer the burden of disproving the existence of jobs admeasuring the normal earnings of the strikers, despite the provision of the Administrative Procedure Act (5 USC 1006(c)) that the proponent of a rule or order shall have the burden of proof.

2. Whether, in proceedings under a decree enforcing an order of the National Labor Relations Board providing for back pay for reinstated strikers measured by a sum equal to that which the employee normally would have earned, the Board may cast upon the employer the burden of disproving the readiness, ability and willingness of the strikers to render service, despite the provision of the Administrative Procedure Act (5 USC 1006(c)) that the proponent of a rule or order shall have the burden of proof.

3. Where an employer, in denying reinstatement to strikers, acted in accord with a statutory provision (29 USC 158(d)) in effect permitting unfair labor practices as to certain strikers, but a majority of this Court, finding that some incongruities resulting from the application of otherwise clear language rendered that provision "sufficiently ambiguous" to require reference to legislative history from which, although terming the history "inconclusive", it deduced a limitation on the Congressional purpose not apparent in the language of the enactment and, by this reasoning, held the provision permitting unfair labor practices inapplicable, has the statute afforded

the employer a standard of conduct sufficiently clear that, consonant with due process, the retroactive sanction of back pay (as distinguished from the prospective sanction of reinstatement) may be imposed on him for periods antedating the first construction of the surprisingly expressed enactment by this Court?

Statutes, Rules and Constitutional Provisions Involved

NATIONAL LABOR RELATIONS ACT (29 USC 151 *et seq.*).

SECTION 8(d):

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

SECTION 10(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such

examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

ADMINISTRATIVE PROCEDURE ACT (5 USC 1000 *et seq.*).

SECTION 7. In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section— * * *

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof * * *

CONSTITUTION, AMENDMENT V:

> * * * nor shall any person * * * ( ) be deprived of life, liberty or property, without due process of law; * * *

Statement of the Case

I. The burden of proof as to earnings.

The proceeding now sought to be reviewed was conducted by the National Labor Relations Board to determine the amount of back pay due the Board under a decree of the Second Circuit affirmed by this Court, which in presently relevant part provided that:

> ". . . Respondents . . . make whole (77 discriminatees) for any loss of pay they may have suffered as a result of the discrimination against them. . . . Loss of pay shall be determined by deducting from a sum equal to that which the employees normally

would have earned for each quarter or portion thereof, their net earnings, if any, in their employment during that quarter. . . ."

The following excerpt from the reinstatement provisions of the decree is also pertinent (B. Orig. App. p. 109):

"If there are not sufficient positions available in appropriate job classifications, the Respondents shall make room for the employees ordered reinstated by dismissing to the extent necessary employees occupying such classifications who were hired after November 10, 1950. If after such dismissal there are still not sufficient positions available, all existing positions in the appropriate job classification shall be distributed among the employees ordered reinstated and other employees who were hired on or before November 10, 1950, without discrimination against any of them because of his union affiliation or strike or concerted activities, following such system of seniority or other non-discriminatory practice as would normally have been applied by the Respondents to determine job retention rights upon a reduction of force. All employees remaining after such distribution, including those ordered reinstated, for whom no employment is immediately available, shall be placed upon a preferential list and offered employment as work becomes available in a suitable classification, and before other persons are hired for such work, in the order required by the Respondents' normal seniority system or other nondiscriminatory practices."

The seniority system in force immediately prior to the strike was a departmental seniority system (Resp. Exh. 3, Resp. Orig. App. p. 1016), under a contract providing:

"Layoffs by seniority in their respective departments."

The Board in the unfair labor practice proceedings, found a multiplicity of departments in the Respondents' establishment *e.g.* machine shop, finishing department, molding dept. (Board Orig. App. p. 36), maintenance, packing (*id.* p. 51) ukelele (*id.* p. 52) buffing room of the finishing department (*id.* p. 66); it also found a three-shift operation (*id.* pp. 54, 70).

The Board also then found that 16 employees whose tenure antedated the strike of November 20, 1950 had returned to work on December 11, 1950 (*id.* p. 75) and seven more had returned at unspecified dates (*id.* p. 77); a total of 23 not required to be dismissed to make room for discriminatees. The discriminatees numbered 77 and, with the 23, the total "constructive" employment roster was 100 employees.

The Board's back pay specifications (first pleading) were issued on June 14, 1960 (153a). They alleged that the discriminatees were employed in "various jobs," but did not identify by department or otherwise which job the discriminatee had held. They next set out the hourly rates paid to each individual immediately before the strike. The Board alleged that certain general increases had been granted by the Respondents to incumbent employees during the back pay period, resulting in constructive increments to the rates pleaded but did not otherwise plead the pay rates of the replacing incumbents, i.e., it did not set out their occupations, classifications or departments. The Board then alleged "the average weekly hours worked during the back pay period by (unidentified) incumbent employees furnishes an appropriate measure of the hours the discriminatees would have worked." It then alleged that the hourly rates adjusted for general increases were multiplied "by calendar quarter total average hours worked by (unidentified) incumbent employees." It added allegations claiming vacation pay and year end bonuses and proceeded to credit the Respondents with certain interim earnings stated severally for each of the strikers.

On June 28, 1960, Respondents demurred to the specifications (159a) on the ground that "they failed to allege that a position existed to which it will be claimed that the individual discriminatee was entitled to reinstatement and in that they failed to identify said position with respect to each discriminatee severally and the time each such position became available." The demurrer was overruled on July 21, 1960 (166a) on the ground that Respondents had the burden of proving that jobs were not available at their plant. Respondents then answered, admitting the accuracy of the Board's computations but denying, as required by Board pleading rules (R&R 102.54 *b*), the accuracy of the measure of constructive earnings proposed and the assumptions of job existence and identity underlying the specifications. Board counsel moved to strike the answer on the ground that it was not sufficiently specific under the cited rule and prevailed on the motion. Respondents thereupon filed an amended answer still denying the validity of the measure and the assumptions of job existence and identity but, adding, in tabular form, the facts showing the number of jobs existing in Respondent's plant at any given time during the back pay period (which the Board had previously pleaded as part of its "average" calculation), identifying the jobs and the seniority order in which the strikers would have been entitled to displace the incumbents in the jobs if they could perform the work. This answer was accepted as sufficient (27a).

The answer as accepted by the Trial Examiner raised issues of fact as to the existence of various jobs at various times during the back pay period. From the numerous issues of fact raised by the tabular form of answer, the following may be gleaned as illustrative:

1. An entire department employing 8 of the strikers (the "Shoe Form Finishing" Department) was never reactivated after the strike, the employer having abandoned the manufacture of "shoe forms". The 8

strikers had followed the specialized trade of "asher-polisher", a trade not utilized by the employer after the strike.

2. In the first full quarter of the back pay period (2nd 1951) at no one time were more than 83 jobs in existence; incumbent in 23 of these jobs were old employees which, the Board had found, were not required to be displaced, leaving a total of 60 jobs into which the 77 discriminatees had to be fitted.

The trial on these pleadings is thus described by the trial examiner (App. Pet. 27a):

"Upon commencement of the hearing, the General Counsel placed in evidence the specification and the Respondent's answer. He then proceeded to place on the witness stand each available discriminatee who testified as to his employment activity during the interim period which constituted the back-pay period. Each of these discriminatees generally testified to the efforts made to seek work, the periods during which each worked, the employer or employers for whom the work was performed, the expenses involved in seeking such work and the amounts of interim payment earned during the back-pay period. With the exception of certain individuals, hereinafter discussed, the testimony of all of these individuals established, essentially, that they were entitled to certain amounts of back-pay, hereinafter specified. The General Counsel made no attempt during his case to set up in any way the facts concerning the availability of jobs at the Respondent's plant for each discriminatee during the back pay period."

"At the close of the General Counsel's case, and after each of the available discriminatees had testified as aforesaid, the Respondent moved for dismissal of the complaint on the ground that the General Counsel

had failed to establish a *prima facie* case, and more specifically upon the ground that the General Counsel had failed to prove job availability. The Trial Examiner ruled that the burden of proof with regard to the issue of job non-availability was upon the Respondent and that, therefore, the General Counsel did not have to show affirmatively that the jobs were available in the Respondent's plant during this period but, rather, that it was for the Respondent to prove that jobs were not available for each discriminatee at all times during the backpay period."

"The Respondent excepted to this ruling and appealed to the Board by way of an interim appeal. The Board denied the appeal and denied any stays based upon the appeal. Then, after making motions as to individual claimants with regard to claimed failure of proof as to efforts to find work and other minor issues, hereinafter discussed, the Respondent was asked if it intended to proceed with its case and it refused to do so. The Respondent's counsel stated that since it was his opinion that the burden of proof as to job availability was upon the General Counsel, he felt that he was not obliged to go forward with his case but that the General Counsel has failed to make and prove a *prima facie* case."

"The undersigned then admonished the Respondent that unless the Respondent proceeded with the case, I would be forced to conclude that the Respondent was resting and close the hearing. The Respondent remained adamant in its objections and its exceptions and refused to proceed at which time on December 1 1960, I declared the hearing closed."

On the foregoing facts, Respondents contend that, the Board not having proposed a formula taking account of job availability, the burden of proof was on the Board to show, as the proponent of a rule or order under Admin-

istrative Procedure Act, Section 7(c), with reference to each employee, that his job or some substantially equivalent job existed at each time for which an award is made, and that, upon a record lacking such proof of constructive earnings, the Board was bound to dismiss.

II. The burden of proof as to claimant availability.

This issue embraces the notion, summed up by the hornbook phrase "ready, able and willing to work" that a causal connection be established between loss of wages and the unfair labor practices found.

The issue is involved in nearly every one of the claims, the Board or the Trial Examiner expressly resolving the issue against Petitioner on the ground that the burden of proof was on petitioner to show the negative, viz., that the specific striker was not ready, able or willing to work. In the concrete, the issue takes various forms, eg. strikers who entered business as entrepreneurs (Ebert, 64a; Miller 88a; Smith 146a (disallowed by Appeals Court)), strikers who failed to search for work (Shaw, 117a), strikers who voluntarily quit employment (Boyd, 52a).

The issue is involved in almost every one of the seventy claims, and a recital of all would unduly burden this presentation. In the circumstances, counsel selects the case of Abraham Unger (44a) on which the Board reversed the Trial Examiner, as illustrative.

Unger died on June 30, 1953 and was, hence, not available as a Board witness. His son Richard, provided the sole testimony, much of it hearsay. The son testified that his father was hospitalized for a heart attack at the beginning of the back pay period, that the son visited the father at the latter's home some two months thereafter and on several later occasions ranging up to August, 1952 and his father stated that he was looking for work. In August, 1952, the father commenced to live with the son and the son related various subsequent efforts of the father to obtain work.

On this record, the Trial Examiner found that the evidence for the period prior to the claimant's residence with his son "not sufficiently detailed or certain to base a finding" and, accordingly, denied recovery for the period of non-residence. The Board, reversing, and allowing recovery said:

> "However, since the burden is upon the Respondent to prove that the Claimant did not make a reasonable search for work, and since Respondent refused to either cross-examine the witness or present other evidence that the claimant was still incapacitated by illness or otherwise failed to search for work, we find that the claimant made the necessary effort and award his estate the full amount claimed by the specification."

The quoted language makes it quite clear that the Board ruled upon two distinct subjects, viz.

(1) Whether the claimant was able to work.

(2) Whether the claimant searched for work.

It is to be noted that, consonant with its theory that the burden of proof on all issues rested on the Respondents the General Counsel with Board approval announced that he was calling witnesses merely "as a public service" (11a).

The Second Circuit, while affirming the Board holding as to burden of proof, would not push the doctrine to its logical conclusion that the Board's action in calling witnesses was not compelled. It invented an intermediate position, noting a possible disagreement with the Eighth Circuit, that required the Board to produce the claimant as a witness, but left the employer with the burden of proof, apparently including both the notion of going forward with the evidence and the notion of ultimate persuasion. The Board is required merely to produce a "warm body".

In the premises Respondents contend that under Administrative Procedure Act 7(c), the burden of showing that the employee was ready, able and willing to work was on the Board, and that, on a record lacking such proof, the Board was bound to dismiss the claim.

III. The due process issue.

The back pay answer raises a question of due process by pleading as affirmative defense III (197a)

> "The imposition of backpay, except with reference to Ciccone, upon the basis of a statute, to wit, Section 8(d) of the Act, held to be vague and ambiguous, which furnished no certain standard of conduct to Respondents, deprives the Respondents of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States."

Section 8(d) of the National Labor Relations Act reads in part:

> "Any employee who engages in a strike within the sixty day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute for the purposes of Sections 8, 9 and 10 of this Act."

On the face of Section 8(d), where a "cooling off period" strike has occurred, the employer is exculpated of unfair labor practices, whether committed before (Section 10) or during or after (Section 8) the strike, with the result that reinstatement of strikers is not required. No word in the "loss of status" clause imports any qualitative distinction between the delicts which are cancelled and those which are not. Its reference to the proscribed period is exclusively temporal; it contains no hint that any class of strike is without its proscription.

Under the clause, Petitioners, believing themselves exculpated by the strike from any unfair labor practices, whether pre-strike or post-strike declined to reinstate the strikers when they applied for reinstatement. This Court, however, 350 U. S. 270, held that the exculpation was not effective as to a limited class of strikes. The majority opinion is not clear as to whether the exempt class of strike embraces only unfair labor practice strikes or embraces all strikes not designed to terminate or modify a contract, e.g., a strike to protest a change of supervision. In arriving at its conclusion, the majority said (p. 287):

> "There is sufficient ambiguity here to permit consideration of relevant legislative history."

But, in the legislative history which it examines, it finds "no conclusive answer". The three justices who dissented supported Petitioners' construction of the Act.

Petitioners claim now advanced is that, while it is the function of this Court to resolve ambiguities left by Congress in its legislation and while they do not challenge the Court's resolution of the "sufficient ambiguity" which it found as applied to the future conduct of the Petitioners (i.e., the reinstatement remedy), it violates due process to apply to Petitioners retroactively (i.e., the back pay remedy) a standard of conduct not ascertainable with reasonable certainty at the time of the act or omission regulated by the uncertain standard. The consequence in this particular case would be the exclusion of so much of the back pay period as antedated the elimination of the uncertainty, i.e., the date of this Court's opinion.*

Neither the Trial Examiner nor the Board passed upon this claim, although it was asserted before them.

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* Employee Ciccone was discharged prior to the strike and cannot be said to have struck in violation of Section 8(d). His backpay period would not be affected.

The Second Circuit rejected the claim in a footnote characterizing it as "frivolous", but bottoming its reasons for rejection on the assumption that uncertainty in the standard of conduct violated due process only where it resulted from "vagueness" of the statute and on the further assumption that the exaction is made as a "compensatory liability" rather than one made to effectuate a public policy. Curiously it notes the abrogation by the Portal to Portal Pay Act of such retroactive liabilities, without appearing to recognize that the Congressional motivation was the monstrous unfairness of retroactivity, a notion encompassed by due process.

Reasons for Granting the Writ

I. The Burden of Proof Issue—Earnings

Behind the nuances of pleading, it will be seen that the Board has elected against following the natural method of proving the lost earnings of a striker, i.e., the method of proving the earnings of the employee who succeeded him in his particular job. Had it followed that natural method, all the basic elements of lost earnings would, of necessity, have been included in its proof. The hours worked by the successor, who could have worked only when the job was "available"—would have been an unassailably accurate reflection of lost earnings. Had the Board followed this natural method, the question of the burden of proving job availability would not have arisen; the Board would simply prove the hours worked by the successor and that would have disposed of the matter.

But, for some reason never explicated by the Board, it proposed a formula to substitute for the natural method of showing wage loss. Now there is no doubt that a formula could have been developed to measure wage loss with reasonable accuracy; such formulae were in fact proposed by the Petitioner in settlement negotiations. But the formula actually proposed by the Board, was obviously mathematically erroneous; it did not measure lost earnings. For each week of the backpay period (the weekly basis was acceptable to Petitioner) it proposed the following calculation:

$$\frac{\text{(Incumbent hours worked)}}{\text{Number of incumbents}} \times \text{Number of Strikers} = \text{Hours lost by strikers}$$

A test set of figures applied to that formula will show the error:

$$\frac{400 \text{ hours worked}}{10 \text{ incumbents}} \times 77 \text{ strikers} = 3080$$

It is obvious, under the assumption, that no more than 400 hours could have been lost; the 400 hours actually worked by incumbents is the mathematical limit of the hours lost. Yet the formula shows 3,080 hours lost.

Let it be noted that, even as the Board proposes the formula, the burden falls on it to establish both the number of incumbents in any given week and the total hours worked in that week by those incumbents; these are the necessary ingredients of the "average hours worked by incumbents" which it alleges in its pleading. It therefore not only had, but alleged, precise knowledge as to the jobs available and the number of hours worked in each job. It is passing strange that where the Board founds its claim on the number of available hours and jobs, and projects the result by a mathematically erroneous formula, it becomes the burden of the employer to show, not that the Board claim as to available hours and jobs was erroneous (employer admitted them), but that the excess over those available hours and jobs produced by the error in the mathematical formula projecting them was non-existent. The employer must disprove a fiction.

Faced with this problem, Petitioner demurred (159a) saying in effect "Fish, or cut bait: If you propose to calculate gross backpay per individual, identify the job or series of jobs in which he would have worked the hours claimed for him; if you propose to calculate per formula (lump sum) set out a complete formula in your pleading" (164a).

When the demurrer was overruled, Petitioner had no choice but to deny the allegation that average hours worked by incumbents constituted a measure of the hours the strikers would have worked. It proceeded to trial on that denial. Since Board pleading rules require specificity in denials (182a), the denials took the form of weekly tables showing which jobs Petitioner admitted to have been operated during the years of the backpay period, accompanied by denials

that jobs were available to any greater extent than admitted. These weekly tables corresponded exactly with the allegations of the Board (the "average" calculation) as to number of incumbents and hours worked by incumbents, and hence, in any rational system of pleading, would be deemed admitted facts.

Thus, in this somewhat circuitous manner the issue of "job availability" was raised. It arises because the Board alleged a formula having no relation to the number of hours a striker would have worked. The burden of proof is sought to be shifted by employing a fiction.

In 1946, Congress, having struggled for a decade with the problem of controlling the numerous and diverse federal agencies to prevent unfairness to the citizen, enacted a comprehensive code for their regulation. One feature of this code was the fixation of the burden of proof in their proceedings, for it would accomplish little to provide a more extensive judicial review[1] if a want of evidence could be cloaked by a shifting of the burden of proof.[2] The Administrative Procedure Act, hence, provided (Section 7(c); 5 U.S.C. 1006(c)):

> "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof."

The deliberate design of the enactment is such that it not only fixes the incidence of the burden in the first instance; it goes further and removes from the agency the power to alter the incidence. It expressly reserves to Congress the power to fix the incidence of the burden;[3] no agency may alter it, either by rule or by course of adjudication.[4]

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[1] *Universal Camera Co.* v. *N.L.R.B.*, 340 U. S. 474 (1951).

[2] *Speiser* v. *Randall*, 357 U. S. 513.

[3] As by a presumption, cf. Longshoremens & Harbor Workers Compensation Act, Section 20(d), 33 U.S.C. 920(d) (Presumption of absence of willful intent to injure).

[4] The Second Circuit, in its opinion, referred to the "traditional allocation of the burden". It does not explain whether the tradition refers to "Board law" or some other source.

The proceeding at bar was conducted to determine the strikers' "loss of pay" which involved the determination of what each employee "normally would have earned for each quarter".[5] Under pleadings which denied that any striker would normally have earned any wages, the General Counsel rested without offering proof that any striker would normally have occupied the job of any incumbent or that the job which the striker had occupied was revived and continued after the strike or that the striker would have been entitled to be placed in the job of any incumbent.[6] Petitioner, citing the quoted statute, moved to dismiss on the ground that the Board had not made a *prima facie* case, since it had not established what the employee normally would have earned. The Trial Examiner held that the Board had no such burden; that it was incumbent on the employer to establish the negative. Petitioner, thereupon, declined to proceed and was concluded. Thus, the record contains no evidence of what the striker normally would have earned.[7]

The Trial Examiner in his Supplemental Intermediate Report (28a-32a) discusses the rule of the Administrative Procedure Act in much the same terms as the Second Circuit. The Board itself, though it affirmed on the point (13a) did not attempt to rationalize its rule in the light of that Act, but contented itself with restating the rule.

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[5] Matter in quotations from Decree.

[6] In the unfair labor practice proceeding it was affirmatively found that 23 non-strikers returned when the plant reopened, and the decree did not require displacement of these employees.

[7] Board Rules and Regulations 24 CFR 102.53 require it to plead "specific figures and basis of computation as to gross backpay". The specification as drawn calculated "gross backpay" by applying the rate paid the striker to average factory hours worked, neither stating the volume of employment (which must have been included in the calculation of the average) nor the classifications of the employees included in the average. "Gross Backpay" therefore rests on the unproven (and unprovable) premise that there were more jobs than strikers. It is a purely fictional amount having no relation to what would have been earned.

The Second Circuit, enforcing as to this point, apparently construed the "burden of proof" imposed by the Administrative Procedure Act as limited to the "burden of going forward" with the evidence and as not comprehending the "burden of ultimate persuasion".[8] It thought the Congress, by the Act, did not intend to disturb the "traditional allocation of the burden of going forward,"[9] finding support in a comment in the legislative history:

> "That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result also for that purpose have a burden to maintain." Sen. Doc. No. 245, 79th Cong. 2nd Sess. 208, 270 (1946).[10]

It concludes that the Board, which it concedes to be the proponent of the order, is exempted from proving what the striker "normally would have earned" to the extent that it need not prove that he would normally have been employed. It accomplishes this result by making "job non-

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[8] A doubtful construction. The bills underlying the provision would have imposed a burden of "proceeding", i.e., going forward, but were corrected to impose a burden of "proof" (Leg. Hist. A.P.A. pp. 11, 158). The *Baldor Electric Co.* case, *post*, regarded the burden as one of persuasion.

[9] The entire Act bespeaks a "mood" of confining both the rule-making and adjudicative functions within limits. The Court does not explain why this provision is an exception. *Universal Camera Co.* v. *N.L.R.B.*, 340 U. S. 474 (1951).

[10] The "different result" would appear to be something other than a mere negation. Obviously the burden cannot rest on two adversaries at the same time, but the diverse natures of the proceedings regulated by the Act give rise to situations where the "different result" is meaningful, e.g., the applicant for a certificate of convenience and necessity must prove convenience and necessity, but a prospective customer or competitor seeking to burden the certificate with rates or other conditions must prove the justification for the conditions.

availability'' an affirmative defense.[10a] In justification it relies on

1. The purpose behind the backpay proceeding;

2. Practical administrative convenience.

On the first item, the Court remarks that ''an employer is allowed the defense of job unavailability so that an otherwise appropriate backpay order will not work an economic hardship''. It is indeed difficult to see why an order awarding a sum exceeding that which a striker could possibly have earned is ''otherwise appropriate'' or why it is ''backpay'' in any sense. If ''backpay'' is construed to mean anything more than a recoupment of normal constructive earnings, it takes on penal characteristics.[11] The phrase of the decree ''what the discriminatee normally would have earned'' is an exact description of the notion of ''backpay'' as used in the statute.[12] The notion is compensatory, and the ''purpose of a backpay proceeding'' cannot transcend that notion.

In considering the item of practical administrative convenience[13] the Court relies on the fact that the employer had knowledge of the availability of jobs, had kept the records of availability and was hence in a better position to explain ambiguities in the records (none was asserted).

[10a] It is difficult to see how, when the Board has alleged that incumbents worked a limited number of hours (its "average" calculation) but claims without proof that the strikers would have worked a greater number of hours, it becomes a matter of affirmative defense to rebut the claim for the greater number. The "defensive matter" appears on the face of the Board's pleading.

[11] *Republic Steel Co.* v. *N.L.R.B.*, 311 U. S. 7.

[12] NLRA Section 10(c).

[13] At least some of the inspiration behind the Administrative Procedure Act stemmed from the tendency of agencies, single mindedly pursuing legitimate administrative goals, to foist their problems on the citizen. This notion apparently had an influence on the "burden of proof" provision. Cf. Leg. Hist. A.P.A. p. 30.

But this misconceives the problem: the employer knows fully what jobs he had available, and the Board likewise knew what jobs were available and, in fact, pleaded them in its "average" calculation, but the issue is by which of the available jobs must the normal constructive earnings of the striker be measured? Concretely, the answer asserted that a department closed by the strike was never thereafter revived and eight of the strikers, asher-polishers, were in that department. This the employer might readily have proved. But that does not end the matter, for the decree provided for "substantially equivalent" jobs and contained an elaborate scheme for the distribution and devolution of jobs in the event a striker's job was non-existent, which provisions measured his right to backpay. Does the asher-polisher, whose job was non-existent, now claim the job of the janitor? And is the janitor an ante-strike employee who need not be displaced? And if not the janitor, does the asher-polisher displace some other striker? If that other striker be a machinist, can the asher-polisher operate a lathe? These questions the employer cannot even begin to answer until he knows what the Board is claiming.

The issue of job availability, or of unavailability, as the Second Circuit would have it, is not the simple issue which can be resolved from the employer's records by counting the number of available jobs. The questions are: into which of the available jobs can the striker be fitted, what would his earnings have been on that substitute job, and which incumben would he have displaced?[13a] These questions, which pose complex litigative problems, might have been avoided by the Board had it proposed a formula giving effect to the factor of job availability. But it can-

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[13a] Although the Adm. Proc. Act was not involved, the Seventh Circuit in *NLRB* v. *National Die Casting Co.*, 207 F. 2nd 344, set aside a Board order in unfair labor practice proceedings where the Board had not shown that jobs were available for strikers.

not, by using an incomplete and erroneous formula, toss its litigative problems to the employer; it is to prevent just such manoeuvering that the statute fixed the burden of proof in administrative proceedings.

The massive number involved here tends to obscure the reality; we are in a formula[14] syndrome. Had the employer of a single bookkeeper announced a plan to install a computer and the bookkeeper joined a union and the employer discharged him, making a derogatory remark about the union and the Board reinstated him, it would be up to the Board to prove his ability to operate the computer. Mere numbers do not alter the principle.[15] Formulae should reflect facts, not displace them.

The opinion of the Court of Appeals provides no rationale for explaining why other elements of the backpay allegations, as to which the employer had equal knowledge, and as to which he had kept the records, are the burden of the Board. Rates of pay, hours worked, bonuses and vacations must be determined from the selfsame records which show the availability of jobs. The Board's pleading, as to these matters, is based wholly on these records.

Nor does that Court provide a rationale for explaining why, when the Board alleges that a striker would have worked a stated number of hours (154a, Par. "C") and the employer denies it (original answer, 169a, Par. "C"; amended answer 191a, Par. "C") the burden shifts to the

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[14] The Second Circuit in a footnote (Footnote 2) remarks "Gross Backpay owed by respondents was computed in accordance with a formula long employed by the Board in backpay proceedings. Respondents do not challenge this formula". In fact the petitioner did challenge the Gross Backpay formula used here as not measuring constructive earnings. What it did not challenge was "quarterly computation", called the "Woolworth formula", sustained in the "Seven-up" case

[15] The Board did not propose a formula making allowance for the number of jobs then current in the employer's plant, it relied on individual claims. It tried the case on that basis.

employer to support his denial. The Court seems to concede that the burden of proving "hours worked" is on the Board. If the Board proves no "hours worked", it proves no "gross backpay" for the striker. Availability is a mathematically integral part of "hours worked". An unavailable job is one in which the "hours worked" equal zero.

In the *Baldor Electric*[16] case, a stronger case of practical administrative convenience was asserted by the Secretary of Labor as a reason for exempting him from the burden of proving the validity of a wage survey underlying his determination of prevailing minimum wage rates. The Labor Department for years had collected wage data upon a pledge of confidentiality to those supplying the data. Such pledges are commonly given not only by the Department but by nearly all wage surveyors. To compel the Secretary to name participants would destroy the entire system of surveying. Yet, the District of Columbia Circuit held the Secretary to his burden of proof under Section 7(c) of the Administrative Procedure Act, and upon his declining to identify the survey participants, set aside the minimum wage he had established. If practical administrative convenience is the basis of the holding of the Second Circuit in this case, there is a clear conflict with the holding of the District of Columbia Circuit.

The incidence of the burden of proof in backpay proceedings is obviously important to the administration of the National Labor Relations Act. In excess of five thousand backpay claimants annually are receiving awards which, in fiscal 1964, aggregated over $3,000,000. The burden of proof affects reinstatement proceedings in precisely the same way, and there are three or four thousand employees reinstated annually.[17] The burden of proof is important not

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[16] *Wirtz* v. *Baldor Electric Co.* (no official report), 50 Labor Cases ¶31603. Final decree affirmed 337 F. 2nd 518.

[17] National Labor Relations Board, 29th Annual Report, pp.13-16.

only in the litigated cases; it is a major factor in settlement negotiations. At one point in this very record, Board Counsel seriously argued to the Trial Examiner that one reason for the Board policy as to burden of proof was that it tended to produce larger settlements and urged the Examiner to support the Board rule on that ground.

Equally important is the burden of proof to the administration of that much more pervasive Act, the Administrative Procedure Act, which governs nearly all of the multitudinous[18] and diversely functioning federal administrative agencies. If, instead of the test of proponency, the test of knowledge or the test of practical administrative convenience or some other test is to be the resolvent of the burden of proof, the operation of these far-flung agencies would be affected, along with the lives of the hordes of citizens that deal with them.

While a relatively small number of cases are cited in the Annotated Code to the burden of proof provision of Section 7(c) of the Administrative Procedure Act, this is a deceptive index of the importance of the provision. Failure of a party to carry his burden of proof usually shows up in review proceedings as a want of substantial, reliable and probative evidence and the courts tend to discuss the want of evidence, subsuming the question of the burden of proof. It is safe to say that underlying nearly all cases hinging on want of evidence, the incidence of the burden of proof plays a significant, albeit a silent, part. The Administrative Procedure Act is an integrated whole; a disturbance in the burden of proof area will be reflected in the review area. The burden of proof provision of the Act has an importance not reflected by a numerical count of the cases especially referring to it.

There is a further reason for granting the writ. This Court has never before examined an NLRB backpay pro-

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[18] Counsel has been unable to discover any quantitative data on the present "head count" of agencies. Prior to the enactment of A.P.A. the Attorney General's committee had issued monographs on 27 of the then more important agencies. Attorney General's Manual on the Adm. Proc. Act., p. 5.

ceeding. The Court below, *sua sponte,* called upon the Board to explain a four year delay in the commencement of backpay proceedings, and the Board explained its delinquency in terms of manpower shortage. This counsel has noted (the citations now escape him) two other cases in which Courts of Appeals have observed, querulously, delays of four years, and the Board, had those Courts pressed the matter would, no doubt, have explained in terms of manpower. However superficially satisfying this explanation may be, the real cause may lie much deeper. Where there is a minimal burden of proof, a pleading can be drawn quickly. But it may be that, absolved from the burden and with an almost unlimited range of selection among possible formulae, Board Counsel devote their time to selecting from among the possible formulae that which will produce the best statistical result for the Board's Annual Report. The very absence of the necessity to establish causal connection between loss and delict may be in some part responsible for the Board's egregious delays in these proceedings. Where there are firm pleading rules, a pleading can also be drawn quickly. A firming up of the rules by a court of last resort, whether it supports the Board or not, will at least establish a legal theory eliminating uncertainty, and this cannot but improve the backpay phase of the administration of the Act.

II. The Burden of Proof Issue—Claimant Availability

Having abandoned the factor of proponency and somewhat impaled itself upon the factor of knowledge as the test of the incidence of the burden of proof, the Second Circuit proceeded to examine the issues of "claimant availability", i.e., whether the claimants were "ready, able and willing" to serve during the backpay period. Hence, it finds itself in a dilemma. A long line of cases, none of them taking cognizance of the Administrative Procedure Act, holds squarely that the burden of proof as to these issues is on the employer; and the General Counsel, with utter and compelling logic, had taken the position that he had no obligation to call any discriminatee as a witness, but produced discriminatees *ex gratia* as a "matter of public

service", performing merely an "advisory and co-operative" function in calling them.

But, by the Court's test of knowledge, the burden is on the Board because the discriminatee has the knowledge. It meets the problem by cleaving the burden of proof into the burden of going forward and the burden of ultimate persuasion, placing the burden of going forward on the Board and the burden of persuasion on the employer. But, in apparent realization of the emptiness of imposing on the Board a burden of going forward unaccompanied by a risk of non-persuasion, it finally develops the novel "burden of calling a witness".[19]

Since one witness, Isaiah Smith, a Florida lawyer, had not been produced, the Court set aside the award as to him, though the Petitioner had taken no exception to his mere non-production; its exceptions were directed to the burden of proof and to his removing himself from the labor market (146a).

It may be that the Second Circuit arrived at its final disposition of the issue on some basis not stemming from the Administrative Procedure Act. What is not clear is how it eliminated the Act from bearing on the disposition of the issues. One reading of the opinion would suggest that the Court regarded the burden of proof clause as a nugatory enactment; if this is the holding then there is a square conflict with the *District of Columbia* Circuit[20] and with the *Ninth* Circuit.[21] Another would suggest that "traditional allocations" are not affected by the Act; if this is so, it may be said that the "allocations" in *Wirtz* v. *Baldor Electric Co.* were "traditional", although, as

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[19] Curiously, the Second Circuit had started out with the notion of preserving the "traditional allocation of the burden of going forward . . ." Its own decision in *Zdanok* v. *Glidden Co.*, 288 F. 2d 99, not involving an administrative determination, clearly placed the burden of establishing "willingness to serve" on a claiming employee. By "traditional", it must be referring to Board precedent and not to general law concepts.

[20] *Wirtz* v. *Baldor Elec. Co.* (no official report), 50 Labor Cases ¶31603; further proceedings 337 F. 2nd 518.

[21] *N.L.R.B.* v. *Haddock Engrs. Ltd.*, 215 F. 2d 734.

a rating case, the problem was in some wise legislative; there is a probable conflict under this reading. A third possible reading is that the Court regarded the Petitioners as "proponents of affirmative defenses", although the answer, ultimately accepted by the Board, raised the issues by generally denying the Board allegations as to "hours worked"; here again the *Baldor Electric* case furnishes a probable conflict, for the contestants in that case were "proponents of lower rates".

It should be mentioned that Petitioners' argument before the Second Circuit was, in practical essence, that it was the Board's obligation to show that the striker had sustained loss and that his loss was causally related to the unfair labor practice found; to show the loss it had to show what his earnings would have been (job availability); to show causal connection it had to show that he had been ready, able and willing to work (clamant availability).

III. Due Process

One of the notions comprehended by due process is that a governmental command must be so framed as to provide a standard of conduct which the citizen of common intelligence who is obliged to obey may, in advance of the commission or omission of the act rendering him liable, apprehend what is required of him with reasonable certainty.

While the most common application of the notion concerns criminal liabilities,[22] it is applicable as well to civil liabilities[23] and, although the talismanic formula "due process" was not mentioned in the opinion, it has been applied to the reinstatement of an employee under NLRA.[24]

Statutes which offend the notion have in many instances been called "vague"[25] or "indefinite". These, however, are

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[22] *Connally* v. *General Construction Co.*, 269 U. S. 385; *U. S.* v. *Cardiff*, 344 U. S. 174; *Raley* v. *Ohio*, 360 U. S. 423.

[23] *A. B. Small Co.* v. *Amer. Sugar Refg. Co.*, 267 U. S. 233; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445.

[24] *NLRB* v. *Rockaway News Supply Co.*, 345 U. S. 71, cf. also *NLRB* v. *Atkinson Co.*, 195 F (2d) 141.

[25] The Court below comments that the statute held ambiguous by a majority of this Court was not "unconstitutionally vague".

not limiting terms; they describe a part, but only a part of the range of the vice. Some cases in the larger category result not from the words of the statute but from reversal of a judicial gloss which had been put upon them[26] or the misleading construction of public officials whereby the citizen was entrapped.[27] Uncertainty may be generated by "inexplicably contradictory commands" in the statute itself,[28] by inextricable admixture of innocent conduct in a prohibition,[29] by unduly comprehensive terms[30] or otherwise. The manner in which confusion arises is unimportant; the test in any case is the ability of the person of common intelligence to understand in advance what is required of him,[31] not as measured by the marginal case, but as measured by the main thrust of the enactment.

In the case at bar Petitioner, on March 21, 1951, almost five years before this Court spoke (February 27, 1956) had to decide whether to honor an application by the strikers to return to work. It had before it a statute, which, in its immediate bearing on the question of reinstatement, read:

> "Any employee who engages in a strike within the sixty day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute for the purposes of Sections 8, 9 and 10 of this Act. . . ."

That language is perfectly clear in at least three aspects. When it becomes operative by terminating "employee" status,

> 1. It permits unfair labor practices against strikers from the date of the strike onward (Section 8)

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[26] *Bouie* v. *Columbia*, 378 U. S. 347; *Brinkerhof-Faris Tr. Co.* v. *Hill*, 281 U. S. 673, cf. also *James* v. *U. S.*, 366 U. S. 213, although there the question of willfulness predominated.

[27] *Raley* v. *Ohio*, 360 U. S. 423; *Stevens* v. *Marks*, —— U. S. ——, decided Feb. 28, 1966.

[28] *U. S.* v. *Cardiff*, 344 U. S. 174.

[29] *Stromberg* v. *California*, 283 U. S. 359.

[30] *Lanzetta* v. *New Jersey*, 306 U. S. 451.

[31] *Bouie* v. *Columbia*, 378 U. S. 347.

2. It bars the remedy for unfair labor practices committed against strikers whether antecedent to or subsequent to the strike date (Section 10)

3. It destroys the right of strikers to representation by unions of their choice (Section 9).

Apart from the question as to the circumstances under which the language becomes operative, there is no word or phrase in it which distinguishes one permitted unfair labor practice from another either by statutory categories (Section 8a 1 through 5) or by its objective, e.g., destruction of an incumbent or contending union, or by its gravity, or by any other criterion.

Petitioner, therefore, had to deal with an enactment containing a contradiction: it both permitted and prohibited unfair labor practices; it frowned on them and it smiled on them. That much was clear. The question which Petitioner had to answer then, in 1951, was

> "In what circumstances did Congress permit unfair labor practices and in what circumstances did Congress prohibit them"

The immediately applicable language interdicts strikes

> "within the sixty day period specified in this subsection"

Those words as they stand, suggest none but the purely temporal inquiries

> "When does the period begin; when does it end?"

The words refer the inquirer to the remainder of the subsection. There he finds two references: The first reference (paragraph 1) relates to the duties of the employer if he desires to "terminate or modify" to notify the incumbent union of his desire

> "sixty days prior to the expiration date"

of the extant contract, and imposes a reciprocal duty on the incumbent union. To a reader oriented by the Congressional language to inquire merely as to time, the phrase "prior to the expiration date" or the alternative

phrase "prior to the time it is proposed to make such termination or modification" provides a completely satisfying answer. He has identified the period.

The second reference (paragraph 4) is somewhat more cloudy in that the time lapse between the giving of notice of termination and the expiration (or modification) date may well exceed sixty days, as, in practice, it generally does. Since this is in excess of the "sixty day" period of the loss of status clause, the reader can justifiably conclude that it is not the "sixty day period referred to in this subsection". But even if he does not so conclude, a temporal answer to the reader's question is still a wholly satisfying answer.

True, a "no strike" obligation is laid upon the incumbent union, but the language as such does not suggest that this modifies the obligation of the employee so that he errs only if he "joins" a strike authorized by the incumbent. Whatever inference might be drawn to the effect that Congress regarded the employee interest as joint with the incumbent union is quickly dispelled by the sentence immediately following the fourth clause

> "The duties imposed upon employers, employees and labor organizations by paragraphs (2), (3) and (4) shall become inapplicable upon an intervening certification. . . ."

By this sentence, Congress has indicated its awareness that the stresses of renegotiation time are not limited to the simple stress between the employer and the incumbent; it affirmatively recognizes that employees may oppose the incumbent union to the point of ousting it. But it also seems to reach out to interdict a strike to oust the incumbent (not necessarily related to termination or modification of the contract) until the incumbent is ousted by peaceful Board procedures.

In short, there is nothing in the language, as such, of Section 8(d) to alert the inquirer that he should examine anything but a question of time. A purely temporal answer completely satisfies the language.

The majority opinion in this Court points out an incongruity which results if time is the sole criterion, i.e., that there is no adequate remedy other than a strike against unfair labor practices designed to unseat the incumbent union at a time when employees most need the incumbent union. But the reader's mind has been geared by the Congressional language to make the disjunctive injuiry:

> "When are unfair labor practices permitted and when are they prohibited?"

And though there be incongruity, the reader cannot accept as satisfying the answer:

> "When they are unfair labor practices."

That answer is unresponsive; it begs the question.

It may do very well for a court, five years after the event, to determine that clear language favoring unfair labor practices in certain circumstances is not to be honored because of an incongruity; but that is saying that Congress has misled the reader. The citizen cannot in justice be held responsible for the mistakes of Congress.

Even assuming that the inquiring citizen had the prescience to explore the notion, expressed somewhat uncertainly in the majority opinion, that the words, "termination or modification" altered the employee obligation so as to have it read in effect

> "'within the sixty day period specified in this subsection with the object of terminating or modifying the extant contract"

he would find himself running into incongruities. Under this construction, a strike to continue a contract, such as we now see in the railroad firemen's efforts to retain jobs for firemen, or the longshoremen's resistance to shortening of gangs would be protected. Likewise a strike to oust

an incumbent union would be protected, although this would seem repugnant to the "cesser on supersession" language of Section 8(d). Such activities would appear to be at least as disruptive of smooth contract renegotiation as unfair labor practices designed to unseat the bargaining representative. So, had the citizen explored the avenue of restricting Congressional language to "termination or modification" strikes, he would have wound up balancing opposing sets of incongruities. Whatever be the powers of a court to resolve a balance of incongruities, the law cannot insist that the citizen be clairvoyant at his peril.

The foregoing assumes that the opposing incongruities have equal weight. But, as remarked above, while the incongruity cited in the majority opinions, i.e., unfair practices unseating the incumbent union when the incumbent union is most necessary, is indubitably a true incongruity, it is one which is inadmissible to resolve the problem of construing the language because the "loss of status" clause operates only to permit or remit unfair practices.

The majority opinion finds a "sufficient ambiguity" in the enactment. Apparently the word "sufficient" is used as a diminutive, the sense being "an ambiguity which is barely eked out". It does not pinpoint the ambiguity in the sense of identifying equivocal or unduly distributive words or phrases in the statutory language. Identifiable verbal ambiguity would, at least, have put the citizen on notice that he must inquire as to the meaning of a word, which may be a fair enough burden to put upon the citizen to resolve at his peril.

But the ambiguity found here is something different. As closely as this counsel can apprehend it, it seems to lie rather in Congressional ineptness in choosing the words in which it imposed an obligation. The reasoning toward the ambiguity seems to be that Congress had a limited objective; viz. to put an end to the "quickie" strike as a bargaining tool, that with such a limited objective, it should have

limited its interdiction to bargaining strikes but that, in choosing the language of the interdiction it included "non-bargaining" strikes, which it should not have done. What the majority is saying, in short, is that Congress used the wrong language to express itself. Well and good! But the citizen is not charged, at his peril, with the correction of the errors of Congress.

Still less can the citizen be compelled to flounder in the bog of legislative history to discover the very basis of the ambiguity, i.e., that the Congressional purpose was limited to quenching the "quickie" strike tactic; the more so when the majority opinion admits that the legislative history is "inconclusive".

This is not a case of statutory ambiguity *simpliciter*. The verbiage was clear enough, as three justices of this Court, one judge of the Court of Appeals and two Board members found. The ambiguity lay in the failure of the language to reflect a Congressional purpose, itself deduced "inconclusively" from legislative history.

The statute as phrased was an entrapment; it contained a contradiction "inexplicable" to the ordinary citizen in advance of his action.

No citizen can, in justice, be put upon by an exaction demanded upon the basis of such occult legislation until its meaning has been determined for him. The consequence is that that portion of the backpay period antecedent to the opinion of this Court handed down February 27, 1956 should be excluded from the computation.

The writ should run not only because of the seriousness of the constitutional question tendered but because, in a peculiar way, the prior opinion of this Court, resolving the construction of the Taft-Hartley Act in an occult and somewhat uncertain fashion, really created the issue. No lower adjudicator, obviously, would give serious heed to the question; the Trial Examiner ignored it, the Board

ignored it and the Court of Appeals termed it "frivolous". This Court is the only tribunal in which a serious consideration of the question can be had.

Summary

The writ should run because the case involves:

a) questions important to the administration of the National Labor Relations Act,

b) questions important to the administration of The Administrative Procedure Act,

c) conflicts among Circuits relating to the interpretation of the Administrative Procedure Act,

d) a significant Fifth Amendment due process issue,

e) a situation wherein the first meaningful review can be had only in this Court.

CONCLUSION

This Petition for a writ of certiorari should be granted.

Dated: New York, N. Y., April 18, 1966.

Respectfully submitted,

BERNARD H. FITZPATRICK,
Counsel for Petitioner.

Of Counsel:
THOMAS SHEEHAN.

APPENDIX A

Decree Below.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 22905

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MASTRO PLASTICS CORPORATION and FRENCH AMERICAN REEDS MANUFACTURING COMPANY, INC.,

Respondents.

No. 29442

MASTRO PLASTICS CORPORATION and FRENCH AMERICAN REEDS MANUFACTURING COMPANY, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

SUPPLEMENTAL DECREE

Before: Lumbard, Chief Judge, Waterman and Hays, Circuit Judges.

On August 19, 1954, this Court entered its decree enforcing a remedial order of the National Labor Relations Board which directed among other things that respond-

ents, Mastro Plastics Corporation and French-American Reeds, Manufacturing Co., Inc., their officers, agents, successors and assigns, herein called the employers make whole certain employees because of unlawful discrimination practiced against them.

The Board thereafter held supplemental hearings and issued a Supplemental Decision and Order on April 24, 1962, and a Second Supplemental Decision and Order on February 12, 1964 determining the amounts of net back pay necessary to make whole said employees.

This cause came on to be heard upon the motion of the National Labor Relations Board to enforce its said supplemental orders and upon the employers' petition for review of such orders. The Court heard argument of respective counsel on October 7, 1965, and has considered the briefs and transcripts of record filed in this cause. On December 9, 1965, the Court being fully advised in the premises handed down its opinion granting enforcement of the Board's said supplemental orders with respect to all discriminatees except Isiah Smith.

It appearing that on May 18, 1962, the employers merged into Mastro Industries, Inc. and that Mastro Industries, Inc. is a successor within the purview of the decree of August 19, 1954, and therefore fully liable to discharge the obligations of the employers under the Board's said Supplemental Orders, it is hereby

ORDERED, ADJUDGED AND DECREED that Mastro Industries, Inc., Mastro Plastics Corporation and French American Reeds Manufacturing Company, Inc., their officers, agents, successors and assigns shall make whole said employees found to have been discriminated against by making payments to each as follows:

Morris Brender	$ 61.87
Joseph Harris	57.94
Connis Koiner	53.07
Anthony Migliore	4.36
Charles Pollina	65.99

Estate of Henry Schultz	34.27
Estate of Mary Kennedy	1,983.10
Estate of Alexander Unger	5,138.27
Rose Altieri	5,285.65
Maria Joan Americo Adornetto	1,297.55
Rose Amoroso Vitanza	5,386.47
Jean Bowerman	439.80
James Boyd	3,254.76
Angelo Bruno	826.96
Flora Capers	86.00
Louis Cartagena	4,417.92
Michael Cascione	1,334.10
Louis J. Castaldo	2,588.98
Gaetano Cheli	572.24
Frank Ciccone	1,119.89
Joseph Cirillo	140.00
Rose DeMinno	430.16
Michael DeTuro	206.64
Joseph Ebert	1,076.04
Morris Eskenazi	7,211.60
Yolanda Flamio	7,199.27
Adelaide Fonagy	1,394.62
Fred Franchi	168.08
Dorothy Gherardi	3,795.63
Vernal Gibson Fine	1,953.77
Gloria Gonzales DeTuro	287.65
Bernard Greco	283.16
Evard Green	2,506.10
Louis Hernandes	274.81
Lena Maddalena	3,078.91
Lillie Maddalena	5,228.45
Ralph Maresco	1,468.05
Camille Martone Vaughan	580.65
Joseph Matera	2,284.39
Agnes Messina	5,456.45
James Miller	1,207.74
Mary Occhino Schettino	1,236.39
Marie Olker Finelli	320.31
Jane Pasculli	1,134.26
Carmine Pastore	2,770.52
Henry Paul	10,096.97
Richard Pellay	2,169.10
Eizabeth Petrus	5,681.10

Peter Pieroni	75.08
Rafael Prieto	5,095.45
Antoinette Radice Cassanelli	449.46
Patricio Rivera	2,551.85
William Sandhop	610.63
John Saxton	1,743.32
Ruth Shaw	2,916.29
Estelle Sills Sanzano	2,044.62
Madeline Smolen	231.79
Frank Squillante	272.60
Frank Tommarello	2,106.64
Leopold Weinberg	325.11
Abraham Zimmerspitz	1,477.65
Michael Zinzi	2,674.04
Jose Avalo	3,293.72
Luis Diaz	3,874.50
Salvatore Tripolone	523.00
Henry Vargas	4,152.46
Katherine Crawford Rall	2,224.90
Thelma Delbagno Fisher	835.02
Michael Valentine	12,480.86

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Mastro Industries, Inc., Mastro Plastics Corporation and French American Reeds Manufacturing Company, Inc., shall notify the Regional Director of the National Labor Relations Board for the Second Region, (New York, New York) in writing within (10) ten days from the date of this Decree what steps they have taken to comply herewith.

J. EDWARD LUMBARD
Judge, United States Court of Appeals for the Second Circuit

PAUL R. HAYS
Judge, United States Court of Appeals for the Second Circuit

FILED: January 5, 1966
A true copy,
A. DANIEL FUSARO
Clerk.

APPENDIX B

Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 22—September Term, 1965.)

(Argued October 7, 1965 Decided December 9, 1965.)

Docket Nos. 22905 and 29442

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

MASTRO PLASTICS CORPORATION and FRENCH AMERICAN REEDS MANUFACTURING COMPANY, INC.

Respondents.

MASTRO PLASTICS CORPORATION and FRENCH AMERICAN REEDS MANUFACTURING COMPANY, INC.,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and HAYS, *Circuit Judges.*

Petition for enforcement of two supplemental orders of the National Labor Relations Board granting back pay

awards to 70 discriminatees. The orders are enforced with respect to every discriminatee except one.

WILLIAM J. AVRUTIS, National Labor Relations Board, Washington, D. C. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington, D. C., on the brief), *for petitioner.*

BERNARD H. FITZPATRICK, New York, N. Y. (Butler, Fitzpatrick & De Sio, New York, N. Y., on the brief), *for respondents.*

LUMBARD, *Chief Judge*:

The National Labor Relations Board petitions for enforcement of two supplemental back pay orders directing respondents to pay approximately $164,000 to 70 persons who had been discriminately discharged by respondents in violation of Sections 8(a)(1), (2) and (3) of the National Labor Relations Act, as amended, 29 U. S. C. §§ 158(a)(1), (2) and (3). Respondents have filed a cross-petition for review of those orders. The questions here presented are whether the Board's back pay orders were appropriate and, if so, whether those orders can at this time be enforced against Mastro Industries, Inc. (Mastro), the resulting corporation of a merger which dissolved the original respondents after issuance of the Board's first order. We hold that the orders can properly be enforced against Mastro, and we enforce the Board's orders as to every discriminatee except Isiah Smith.

On March 13, 1953, the Board issued a decision and order, 103 NLRB 511, declaring that Mastro Plastics Cor-

poration and French American Reeds Manufacturing Co., Inc. (repondents), had discriminatorily discharged 77 employees; the order required, *inter alia,* that the respondents reinstate the discriminatees with back pay. This court enforced that order, 214 F. 2d 462 (1954), and the Supreme Court affirmed, 350 U. S. 270 (1955).[1]

The reinstatement question was resolved prior to the institution of back pay proceedings, see 261 F. 2d 147 (1958); therefore, the back pay period for each of the discriminatees is indisputably defined. After reinstatement was offered to all, unsuccessful attempts were made to negotiate the back pay question informally, and on June 14, 1960, the Board's Regional Director for the Second Region issued a formal back pay specification and commenced these supplemental proceedings.

At the back pay hearing, the Board's General Counsel placed in evidence the back pay specification, which computed the net back pay owing to each discriminatee by subtracting from a gross back pay calculation[2] the net interim earnings of the discriminatee to the extent that such interim information was available. Testimony of each avail-

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[1] In resolving against respondents a contention based upon § 8(d) of the Act, 29 U. S. C. § 158(d), the Supreme Court commented that there was "sufficient ambiguity" in that section "to permit consideration of relevant statutory history." 350 U. S. at 287. On this appeal, respondents make the frivolous contention that, because of this ambiguity, it would violate due process to assess back pay for the period prior to the Supreme Court's decision. Even assuming § 8(d) is ambiguous, it is not unconstitutionally vague, and there is no policy against imposing "retroactive" compensatory liability when a violation of a valid statutory duty causes economic injury to persons within the protective scope of that statute. Compare, e.g., *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda Local No. 123,* 321 U. S. 590 (1944) (interpreting the term "workweek" in the Fair Labor Standards Act), a decision which was later abrogated by the Portal-to-Portal Pay Act, 29 U. S. C. §§ 251 et seq.

[2] Gross back pay owed by respondents was computed in accordance with a formula long employed by the Board in back pay proceedings. Respondents do not challenge the propriety of this formula. Cf. *N. L. R. B.* v. *Seven-Up Bottling Co.,* 344 U. S. 344 (1953).

able discriminatee was offered to establish the interim earnings received and his efforts to find alternative work during the back pay period. Respondents cross-examined the discriminatees.

At the close of the General Counsel's case, respondents moved to dismiss the proceeding, alleging that the Board had failed to make a prima facie case because it did not present evidence that respondents had jobs available for the discriminatees during the back pay period. The trial examiner denied the motion on the ground that respondents had the burden of introducing evidence in support of this defense. Respondents then declined to offer any evidence in defense, preferring to rest on their claim that the Board's case was legally insufficient. Accordingly, the hearing was closed.

The trial examiner's Supplemental Interim Report assessed the testimony of each discriminatee as to whether he had incurred a "willful loss of earnings."[3] The examiner concluded that 62 of the discriminatees were entitled to final back pay awards; he also recommended that the back pay claimed in the Board's specification for eight discriminatees who did not testify be placed in escrow until the eight came forward and appeared at a second supplemental hearing.

The Board on review adopted the findings and recommendations of the trial examiner with minor alterations. 136 NLRB 1342 (1942). It reaffirmed its long standing rule that the employer has the burden of proof as to whether a discriminatee incurred a willful loss of earnings and whether the employer would not have had work avail-

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[3] See *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 198 (1941). What constitutes a willful loss of earnings is a concept that has been developed in a large number of cases since the *Phelps Dodge* decision. It is accepted by the Board and reviewing courts that a discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason.

ble for a discriminatee due to factors unrelated to the discriminatory discharge. See, e.g., *Brown & Root, Inc.*, 132 NLRB 486 (1961), enforced, 311 F. 2d 447 (8 Cir. 1963); *Ohio Pub. Serv. Co.*, 52 NLRB 725 (1943). The Board took the position that the General Counsel's introduction of the discriminatees' testimony was a "public service" and was not part of his prima facie case.

The Board also adopted the trial examiner's recommendation that eight awards be placed in escrow "to afford the Respondent a reasonable opportunity to examine these claimants." Consequently, the trial examiner held a second supplemental hearing in July 1963, and seven of the eight appeared or testified by deposition. The examiner granted final awards to seven of these claimants,[4] including the one who did not testify (Isiah Smith).

The Board adopted, again with minor alterations, the trial examiner's second Supplemental Decision. 145 NLRB 1710 (1964). The Board did not discuss further the burden of proof question nor did it specifically discuss the final award to Isiah Smith, which award we do not enforce for reasons explained below.

Mastro's challenge to the propriety of the back pay orders raises the following questions: whether the General Counsel's case was legally insufficient because he had the burden of proving job availability; whether the General Counsel had the burden of proving that each discriminatee incurred no wilful loss of earnings; and whether the latter burden, if it lies to any extent with the General Counsel, was satisfied.

We hold that the Board properly placed on respondents the burden of alleging and proving that jobs were not available for all discriminatees during the back pay period. However, we conclude that the General Counsel had the burden of producing testimony by each available discrim-

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[4] In addition, one discriminatee apparently overlooked at the first hearing also appeared and was granted a final award, bringing the total number of awards to 70.

inatee that a willful loss of earnings was not incurred. Nevertheless, we find that the burden of persuasion as to willful loss should remain on the employer and, on the facts of this case as disclosed by the discriminatees' testimony, we affirm the award to each discriminatee who testified. Finally, we enforce the back pay orders against Mastro, the successor corporation.

I. *The Burden of Proof*

Under Section 10(c) of the National Labor Relations Act, as amended, the Board is empowered "to take such affirmative action [against one who has committed an unfair labor practice] including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act. The back pay remedy has the twofold purpose of reimbursing employees for actual losses suffered as a result of a discriminatory discharge and of furthering the public interest in deterring such discharges. Because of "the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment," it is settled that the Board must consider, in computing a back pay award, whether the employer would have had work available for the discriminatee had the unfair labor practice not occurred and whether the discriminatee himself has suffered a willful loss of earnings. *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. at 198 & n. 7.

However, the Board has long placed the burden of alleging and proving these "affirmative defenses" on the employer, see, e.g., *Southern Silk Mills, Inc.*, 116 NLRB 769 (1956), and this allocation of the burden of proof has been consistently upheld.[5] Under the Board's theory, since the

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[5] See *N.L.R.B.* v. *Ellis & Watts Prods., Inc.*, 344 F. 2d 67 (6 Cir. 1965); *N. L. R. B.* v. *Biscayne Television Corp.*, 337 F. 2d 267 (5 Cir. 1964); *Nabors* v. *N. L. R. B.*, 323 F. 2d 686, 690 (5 Cir. 1963), cert. denied, 376 U. S. 911 (1964); *N. L. R. B.* v. *Brown &*

(Footnote continued on following page)

General Counsel sustained his burden of proving an unfair labor practice in the original proceedings against respondents, his only burden in the back pay proceedings was to introduce evidence of the *gross* back pay due, as calculated in the back pay specification.[6]

The main issue in this case, whether the Board must introduce evidence of job availability at respondents' plants, does not involve the ultimate burden of proof, but only the burden of producing evidence; the question is what evidence the General Counsel must adduce to make a prima facie case. Mastro argues that Section 7(c) of the Administrative Procedure Act, 29 U. S. C. § 1006(c), is dispositive and that the other courts that have considered this question have overlooked this statutory provision. We do not agree.

The language of this provision is general: "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." It is true that the General Counsel is the "proponent" of the back pay order, but we do not think that Congress intended by this statute to disturb the traditional allocation of the burden of going forward between the parties to an adjudicative proceeding. The legislative comment to Section 7(c) supports our conclusion:

> "That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming

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(Footnote continued from preceding page)

Root, Inc., 311 F. 2d 447 (8 Cir. 1963); *Snow* v. *N. L. R. B.*, 308 F. 2d 687, 695 (9 Cir. 1962); *N. L. R. B.* v. *Cambria Clay Prods. Co.*, 215 F. 2d 48, 56 (6 Cir. 1956); *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. 2d 585, 597 (9 Cir. 1943); *N. L. R. B.* v. *Reed & Prince Mfg. Co.*, 130 F. 2d 765 (1 Cir. 1942).

[6] We do not stop to consider at this point how the Board can rationalize this argument with the requirement in its Regulations that the specification "specifically and in detail show . . . the net back pay due." 24 C. F. R. § 102.53. See p. 314 *infra*.

> forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain." Sen. Doc. No. 245, 79th Cong., 2d Sess. 208, 270 (1946).

Both the N. L. R. A., as amended, and the Rules and Regulations of the N. L. R. B. are silent as to the allocation of the burden of going forward in a back pay proceeding. The regulations are concerned with problems of pleading; they require specific computation of "net back pay due" in the specification and a specific reply to "each and every allegation of the specification" in the employer's answer. 24 C. F. R. §§ 102.53, 54(b). While, in general, the burden of alleging and proving an affirmative defense to action proposed by an administrative agency lies with the party raising the defense, see *National Airlines, Inc.* v. *C. A. B.*, 300 F. 2d 711 (D. C. Cir. 1962), the question remains what is an "affirmative defense." This last question must be answered by analyzing the purposes behind the back pay proceeding and the practical considerations present in resolving factual issues through administrative adjudication.

We agree with the Board's contention that the burden of going forward with evidence of job availability at the employer's plant should be placed on the employer. In the first place, the burden of going forward normally falls on the party having knowledge of the facts involved. See *United States* v. *New York, N. H. & H. R.R.*, 355 U. S. 253, 256 n. 5 (1957); 9 Wigmore, Evidence § 2846, at 275 (3d ed. 1940). To establish that an employer has reduced or adjusted his business to an extent eliminating the job of a discriminatee requires careful analysis of the books and records of the employer during the back pay period. Of course, the Board has access to these records, but it is the employer who kept the records and who therefore is able to explain them and to interpret any ambiguities they may contain. We agree with the cases that have found this

factor a persuasive reason for requiring the employer to come forward with proof that jobs were not available. *N. L. R. B.* v. *Reed & Prince Mfg. Co.*, 130 F. 2d 765 (1 Cir. 1942); *Underwood Machinery Co.*, 95 NLRB 1386, 1393 (1951).

Moreover, an employer is allowed the defense of job unavailability so that an otherwise appropriate back pay order will not work an undue economic hardship. For this reason, we find it to be an affirmative defense in the traditional sense of that term and a part of the employer-respondents' case.

On the other hand, information relevant to whether the discriminatees willfully incurred a loss of earnings is within the knowledge of the discriminatees, not the employer. While the employer must raise this issue of mitigation of damages in its pleadings, it does not follow that the employer should be required to come forward with evidence by producing the discriminatees. Since one purpose of the back pay remedy is to compensate them only for actual losses, it is logically within the duty of the Board to produce at the hearing the evidence most relevant to this question—testimony by the discriminatees. Furthermore, while the Board correctly argues that its primary concern is the public interest in promoting full production and employment by means of the back pay remedy, it is nevertheless the representative of the discriminatees. If the discriminatees had to sue in their own right for back pay, they would obviously have to testify and be cross-examined. Since the Board presumably has some prior contact with available discriminatees when it computes "net back pay due" for its specification, see 24 C. F. R. § 102.53, it is more likely to know their whereabouts at the time of the hearing. We think it fair to require that the Board make them available.

The Board has produced the discriminatees for testimony in almost every case where the employer has raised this defense. Indeed, the Board has denied awards to em-

ployees when their testimony demonstrated a willful loss of earnings, even if the employer did not produce the discriminatees or offer additional extrinsic evidence on this question. See *East Texas Steel Castings Co.*, 116 NLRB 1336, 1348 (1956); *Ozark Hardwood Co.*, 119 NLRB 1130, 1136-40 (1957); *Missouri Transit Co.*, 125 NLRB 1316 (1959). Because the Board does customarily produce the discriminatees at back pay hearings, we conclude that a rule requiring a discriminatee to testify before his award becomes final is not an undue burden on the Board and would not undermine the efficacy of the back pay remedy.

We recognize this decision is contrary to general language in a long series of Board decisions and in a number of decisions from other courts of appeals. See note 5 *supra*. However, the Board's burden of proof rule was developed in cases where the discriminatees had actually testified and where the question was how to resolve conflicts or insufficiencies in such evidence.[7] These cases are inapposite to the question of whether available discriminatees must appear and testify.

It was not until *Brown & Root, Inc.*, 132 NLRB 486 (1961), that the Board stated that the General Counsel performs only an "advisory and cooperative" function when he produces the discriminatees to testify. The Eighth Circuit affirmed this decision in broad language the implications of which are contrary to our decision here, 311 F. 2d 447 (1963). The Board relies on that decision in this appeal.

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[7] See, e.g., *Missouri Transit Co.*, 125 NLRB 1316, 1331 (1959); *Monroe Feed Store*, 122 NLRB 1479 (1959); *Ozark Hardware Co.*, 119 NLRB 1130 (1957); *East Texas Steel Castings Co.*, 116 NLRB 1336, 1339 (1956); *Southern Silk Mills, Inc.*, 116 NLRB 769, 770 (1956); *Deena Artware, Inc.*, 112 NLRB 371 (1955); *Seamproof, Inc.*, 103 NLRB 763, 766 (1953); *Underwood Machinery Co.*, 95 NLRB 1386, 1393 (1951); *Ohio Pub. Serv. Co.*, 52 NLRB 725, 729 (1943).

But in *Brown & Root*, all final awards to discriminatees who did not testify were placed in escrow until they appeared so as to afford the employer an opportunity to cross-examine on the willful loss of earnings question. This procedure was used by the trial examiner after the first hearing in this case, and its propriety is not challenged. Indeed, in only one case prior to *Brown & Root* did the Board by-pass the escrow procedure where the impending bankruptcy of the employer justified quick action.[8] *Hill Transp. Co.*, 102 NLRB 1015 (1953). Under these circumstances, we do not think prior decisions of the Board or other courts dispose of the question posed by the award to Isiah Smith.

We wish to make clear what we are not deciding when we conclude that the Board should produce the discriminatees to testify. We do not mean that the employer need no longer raise this defense in his answer. Nor do we mean to condemn the Board's practice of requiring payment of the gross back pay figure into escrow when a discriminatee has not appeared initially. The finding of an unfair labor practice and discriminatory discharge is presumptive proof that some back pay is owed by the employer. Therefore, to ensure by use of escrow technique that funds will be available when a discriminatee is finally located and produced is entirely appropriate. Finally, we recognize that there are instances—death of a discriminatee is the most obvious—when it is not possible to obtain his

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[8] In cases subsequent to *Brown & Root* and the Board's decision here, the Board has frequently reiterated that "nonappearance to testify does not disqualify a claimant from entitlement to back pay." *Rice Lake Creamery Co.*, 151 NLRB 105, at p. 36 (March 27, 1965). It seems significant that *Rice Lake* is apparently the only one of these cases where a final award out of escrow was granted to a discriminatee who did not testify. And, in that case, the employer had served the discriminatee with a subpoena but had failed to pursue him further despite the urgings of the trial examiner. While we disapprove of requiring the employer to produce the discriminatee, in that case the employer seems to have abandoned his defense.

testimony. See also *Hill Transp. Co., supra.* Of course, when there is no way of producing a discriminatee, the Board may decide to accept other evidence, such as a deposition.

In the instant case, the record reveals that Isaiah Smith, the discriminatee who did not appear at either hearing, is now a Florida attorney. No unusual circumstances are shown to justify his failure to appear; the trial examiner made the award to Smith ($1196.33) final on the ground that respondents produced no evidence to show that Smith's interim earnings were other than as set forth in the specification. It is clear that respondents' original answer put in issue the question of Smith's diligent search and his availability for work. Since the best method of resolving these issues was to obtain Smith's testimony, since there is no showing that he was unavailable, and since we conclude that the Board has the burden of producing him, we refuse to enforce this award.

II. *Sufficiency of the Evidence*

Mastro alleges that the testimony of many of the discriminatees demonstrates a willful loss of earnings for a variety of specific reasons. Because we conclude that the discriminatees were obligated to appear, and because respondents preserved these objections, see N. L. R. A. § 10(e), by raising this defense in their answer and by cross-examining the discriminatees, we cannot, as the Board did, ignore these contentions.

Nevertheless, we are unwilling to overturn the long line of cases which place the burden of proof as to these matters on the employer. While orderly adjudication may dictate that the General Counsel produce the witnesses, it is not practical, and it would significantly hamper the back pay remedy, if each discriminatee were required to prove the propriety of his efforts during the entire back pay period. See *Lozano Enterprises,* 152 NLRB No. 25 (May

5, 1965). As the Supreme Court has said in a different context:

> "It is true that there was uncertainty as to the extent of the damage; but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 562 (1931). See also *Palmer* v. *Connecticut Ry. & Lighting Co.*, 311 U. S. 544, 560-61 (1941).

Since proof of the discriminatory discharges established that some damage had been suffered, it was proper for the Board to leave with Mastro the burden of proving facts to mitigate the extent of those damages. We now turn to Mastro's specific allegations.

Mastro argues that the awards to several discriminatees cannot be sustained because their testimony demonstrates that they voluntarily and unjustifiedly quit substantially equivalent employment. While the Board erroneously refused to consider this challenge, the trial examiner made careful findings and determined that in each case the discriminatee was justified in quitting the job in question because, for example, it endangered his health or required him to commute excessive distances. We have carefully examined the record as to each of these discriminatees, and we conclude that the examiner's findings are supported by substantial evidence on the record as a whole. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951).

Several discriminatees secured substantially equivalent employment or became self-employed during the back pay period and yet suffered additional losses thereafter. Mastro argues that the taking of such employment terminates completely its back pay obligation. We do not agree. The only issue here is whether the discriminatee willfully in-

curred a loss of earnings. It would be unjust to require him to mitigate his damages to the greatest extent possible but then to penalize him for substantial but short-lived success. Unless in taking substantially equivalent or self-employment the discriminatee willfully forewent greater earnings, his back pay should not be reduced beyond the interim earnings he in fact received.

Mastro's final challenge is that the awards to two discriminatees who had died before the hearings cannot be enforced because the testimony of relatives which was received to prove diligent search for work was impermissible hearsay. Mastro relies in this contention on Section 10(b) of the Act: "Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . ."

Even if the testimony here received would be inadmissible hearsay in a civil action, we are not prepared to require the Board to exclude it from a back pay hearing. As the discriminatee could not be produced, the Board could accept other evidence which tended to establish the facts. Here, the evidence was testimony as to the deceased's discussions of his search for alternative work. We do not consider it "practicable," as that word is used in Section 10(b), to exclude this relevant testimony. Moreover, since the burden of proving lack of a diligent search was on Mastro, we fail to see how the admission of this testimony was prejudicial. As we stated above, the Board can only be expected to make available for the employer's cross-examination such evidence as it may reasonably obtain.

III. *The Merger Question*

On May 18, 1962, after the Board's first back pay order had issued, respondents merged into Mastro Industries, Inc., pursuant to Section 85 of the New York Stock Corporation Law (now N. Y. Bus. Corp. Law § 905). This "short form" merger statute requires that the parent cor-

poration own at least 95% of the merged subsidiary's stock; Mastro has admitted that on May 18, 1962, it wholly owned the two subsidiaries.

It is settled that remedial orders of the Board may be enforced against the "successors and assigns" of one who has violated the N. L. R. A. See *Regal Knitwear Co.* v. *N. L. R. B.*, 324 U. S. 9 (1945); *N. L. R. B.* v. *Ozark Hardwood Co.*, 282 F. 2d 1 (8 Cir. 1960). Whether a successor corporation is liable is a question of fact which turns on whether, for example, it is the alter ego of the original respondent or whether it has participated in an attempted evasion of obligations imposed by the Board. See *N. L. R. B.* v. *Deena Artwear, Inc.*, 361 U. S. 398 (1960); *Southport Petroleum Co.* v. *N. L. R. B.*, 315 U. S. 100, 106 (1942).

Mastro argues that the back pay orders may not be enforced against it at this time because the Board has not held a hearing to determine whether it may properly be held as a successor. While in many cases a hearing may be necessary to determine whether a new owner participated in or had sufficient knowledge of an unfair labor practice to be held responsible, cf. *N. L. R. B.* v. *C. C. C. Associates, Inc.*, 306 F. 2d 534 (2 Cir. 1962), where, as here, the evidence before the reviewing court demonstrates beyond doubt that a successor may and should be held liable for outstanding obligations arising out of orders of the Board, we see no reason to require the Board to hold an additional hearing. As we said in *Fay* v. *Douds*, 172 F. 2d 720, 725 (1949):

> "The Constitution protects procedural regularity, not as an end in itself, but as a means of defending substantive interests. Every summary judgment denies a trial upon issues formally valid. Where, as here, the evidence on one side is unanswerable, and the other side offers nothing to match or qualify it, the denial of a trial invades no constitutional privilege. These considerations are particularly appropriate when we consider that the Board must conduct its duties in a

summary way; not, we hasten to add, without observing all the essentials of fair administration, but with as much dispatch as is consistent with those."

Mastro may at this time be charged as a successor corporation. Mastro has admitted that it owned both respondents at the time of the merger. Under Section 85 of the Stock Corporation Law, the resulting corporation of such a merger must be "authorized to engage in business similar or incidental to the business" in which the merged corporations engaged; moreover, the resultant succeeds to "all of the estate, property, rights, privileges and franchises of such other corporation . . . subject to all liabilities and obligations of such corporation, and the rights of all creditors thereof." Mastro has not contended on this appeal that the officers of Mastro Industries, Inc., had no knowledge of or played no part in the original unfair labor practice. In fact, Mastro has made no factual arguments that would support its contention that a hearing is necessary. Under these circumstances, there is no need for a further hearing.

The circumstances which triggered the discriminatory discharge in this case occurred on November 11, 1950. Reinstatement of most of the discriminatees occurred on March 9, 1956; all of the discriminatees had been offered reinstatement by late 1958. Thus, the back pay here awarded has been due for at least seven and in part up to fifteen years. It is regrettable that the enforcement of fairly standard remedies in a case which, except for the original appeal to the Supreme Court, involved no unusual circumstances should be fraught with such delays. Certainly to the discriminatees, a delay of this magnitude must render the back pay award a wholly inadequate and unsatisfactory remedy for their wrongful discharge. Although the Board began awarding interest on back pay awards subsequent to its decision here, see *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), even this could not

undo the economic hardship caused by many years of undeservedly substandard earnings. Moreover, the substantial delay in enforcing the back pay remedy significantly undermines its usefulness in fulfilling the public policy of promoting full production and employment.

This is not a case where the Board has intentionaly acted in a manner contrary to its duty[9] to "proceed with reasonable dispatch to conclude any matter presented to it." Compare *Deering Milliken, Inc.* v. *Johnston,* 295 F. 2d 856 (4 Cir. 1961). Rather, the delay has stemmed from the inherently time-consuming nature of the back pay remedy, complicated by a serious and protracted shortage of Board personnel capable of preparing the specification.

At the request of this court, the Board's General Counsel has supplied a chronology of these proceedings and an explanatory letter. The letter reveals that the task of obtaining compliance with the Board's original order fell to the Regional Office for the Second Region. During 1956 and the years immediately following, the staff of this office fell to its lowest point in recent years while the number of cases rose to such a volume that the Region was eventually divided into three new regions.

The Regional Office made a preliminary estimate of the back pay due the discriminatees while it was processing the reinstatement complaints during the 1956-1958 period. When informal back pay negotiations broke down and a formal specification became necessary, this task proved too great for the Region's personnel and it was referred to the Board's Industrial Analysis Branch in Washington in the spring of 1957. The staff of this branch, however, had been reduced from six analysts to two, and one of these two left the Board shortly thereafter. Thus, the Mastro specification was relegated to the one remaining analyst, who was unable to complete it until early 1960.

In addition to the three years required to prepare the specification, other delays caused by the Board's overall

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[9] See Administrative Procedure Act § 6(a), 5 U. S. C. § 1005(a).

case-load[10] are revealed. It took the Board nine months (June 1952-March 1953) to issue its decision adopting the trial examiner's recommendations in the original proceeding. Thirty months elapsed after respondents offered reinstatement to the bulk of the discriminatees before the Board instituted contempt proceedings to have the remaining persons reinstated. And nearly one year elapsed (May 2, 1961-April 24, 1962) before the Board adopted the first supplemental back pay report. To these delays must be added those incident to obtaining appellate review on four different occasions.

The activities and jurisdiction of the National Labor Relations Board require efficient resolution of "adjudicative" disputes. The efficacy of the Board's remedies almost always depends upon the extent to which they can return the parties to a *status quo ante*. Otherwise, collective bargaining cannot be revived on a meaningful and equitable basis and the potential economic costs of unionizing rise to a point where employees are discouraged from that endeavor. Therefore, remedial action must be speedy in order to be effective. We can only hope that those in the executive and legislative branches of our government who are charged with the duty to effectuate the policies of our federal scheme of labor legislation will note the unfortunate and protracted delays which bedeviled these proceedings so that such delays can be avoided in other cases.

The Board's petition to enforce its supplemental orders is granted with respect to all discriminatees except Isiah Smith.

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[10] The Board's case-load increased phenomenally during the years in question. The total number of cases filed increased steadily from 13,356 in fiscal year 1957 to 27,403 in fiscal 1964. The number of unfair labor practice cases filed rose from 5,506 to 15,620 during the same period, while the number of cases pending at the end of the fiscal year rose from 4,416 to 8,085. (Figures taken from the Annual Reports of the National Labor Relations Board.)

APPENDIX C

Prior Opinion of This Court

MASTRO PLASTICS CORPORATION AND FRENCH-AMERICAN REEDS MANUFACTURING COMPANY, INCORPORATED, PETITIONERS v. NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

United States Supreme Court. No. 19. October Term, 1955. February 27, 1956, 350 U. S. 270.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

NATIONAL LABOR RELATIONS ACT

Mr. Justice BURTON delivered the opinion of the Court. Mr. Justice FRANKFURTER dissented in a separate opinion in which Mr. Justice MINTON and Mr. Justice HARLAN joined.

[*Statement of Case*]

BURTON, J.: This case presents two principal questions: (1) whether, in the collective-bargaining contract before us, the union's undertaking "to refrain from engaging in any strike or work stoppage during the term of this agreement" waives not only the employees' right to strike for economic benefits but also their right to strike solely against unfair labor practices of their employers, and (2) whether § 8(d) of the National Labor Relations Act, as amended,[1] deprives individuals of their status as employees if, within the waiting period prescribed by § 8(d)(4), they engage in a strike solely against unfair labor practices of their employers. For the reasons hereafter stated, we answer each in the negative.

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[1] 61 Stat. 140, 142-143, 29 U. S. C. § 158(d).

Mastro Plastics Corp. and French-American Reeds Manufacturing Co., Inc., petitioners herein, are New York corporations which, in 1949 and 1950, were engaged in interstate commerce, manufacturing, selling and distributing plastic articles, including reeds and other accessories for musical instruments. They operated in the City of New York within the same plant, under the same management and with the same employees. For collective bargaining, their employees were represented by Local 22045, American Federation of Labor, or by Local 3127, United Brotherhood of Carpenters and Joiners of America, AFL. These locals occupied the same office and used the services of the same representatives. During the period in question, the right of representation of petitioners' employees was transferred back and forth between them for reasons not material here. Accordingly, they are referred to in this opinion as the "Carpenters."

In August 1950, Local 65 of the Wholesale and Warehouse Workers Union began a campaign among petitioners' employees in an effort to become their collective-bargaining representative. Petitioners bitterly opposed the movement, believing Local 65 to be Communist-controlled. Feeling that the Carpenters were too weak to cope successfully with Local 65, petitioners asked the Carpenters to transfer their bargaining rights to Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL. When the Carpenters declined to do so, petitioners selected a committee of employees to visit 318, obtain membership cards and seek members for that union. The cards were distributed during working hours and petitioners paid their employees for time spent in the campaign, including attendance at a meeting of 318. Petitioners' officers and supervisors instructed employees to sign these cards and indicated that those refusing to do so would be "out."

September 28, Local 65 filed with the National Labor Relations Board its petition for certification as bargaining

representative. October 24, Local 318 intervened in the representation proceedings and asked that it be certified. However, many employees revoked their applications for membership in 318 and reaffirmed their adherence to the Carpenters. This was followed on October 31 by the Carpenters' refusal to consent to an election on the ground that petitioners had unlawfully assisted 318 in the campaign.[2]

November 10, 1950, a crisis developed when the president of petitioners summarily discharged Frank Ciccone, an employee of over four years' standing, because of the latter's activity in support of the Carpenters and his opposition to 318. We accept the finding of the National Labor Relations Board that petitioners "discriminatorily discharged, and thereafter refused to reinstate, Frank Ciccone because of his organizational activities in support of the . . . [Carpenters]."[3] This discharge at once precipitated the strike which is before us and which the Board found "was clearly caused and prolonged by the cumulative effects of the [petitioners'] unfair labor practices culminating in the discriminatory discharge of Ciccone."[4]

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[2] In December, Locals 318 and 65 withdrew their representation proceedings from before the Board and the Carpenters (through Local 3127) filed its own representation proceeding. January 29, 1951, the Board issued a direction of election in the latter proceeding but, after the Carpenters filed charges of unfair practices, the Board postponed the holding of any election until the regional director might deem it proper.

[3] 103 N. L. R. B. 511, 512, and see 214 F. 2d 462, 464 [26 LABOR CASES ¶ 68,584].

[4] 103 N. L. R. B., at 513. See also, the following findings of the trial examiner:

". . . the purpose of the strike was to protest and seek to remedy the [petitioners'] unfair labor practices. The record does not support a finding that the strike also had as an additional objective the termination or modification of the existing contract. It is true that

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There was no disorder but the plant was virtually shut down until December 11 and it was March 9, 1951, before the Carpenters, on behalf of petitioners' employees, made an unconditional request to return to work. Petitioners ignored that request and neither Ciccone nor any of the other 76 striking employees has been reinstated.

While the strike against petitioners' unfair labor practices continued, the collective-bargaining contract between petitioners and the Carpenters approached its expiration date of November 30, 1950, and, apart from the above-described organizational controversy, the Carpenters had taken timely steps to secure modification of their agreement. October 10, they had delivered to petitioners a notice (dated September 29, 1950) "requesting modification" of the contract.[5] They thus had started the statutory negotiating period running as prescribed by the above-men-

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demands for contract changes had previously been presented to the [petitioners], and there had been some discussion at meetings of Local 22045 or Local 3127 of a possible strike if such demands were not met. But no strike vote on that issue had ever been taken, nor was any strike action otherwise determined upon. On the record as a whole, I am fully satisfied, and I find, that the strike which immediately followed Ciccone's discharge was unplanned and began as a spontaneous demonstration by employees of their protest of the [petitioners'] unfair labor practices. Nor does the record reflect that its character changed after it began to one where the strikers were seeking to compel changes or modifications in economic terms or conditions of employment. There is no evidence that any negotiations were conducted or overtures made along such lines at any time after the commencement of the strike. The [petitioners] at the hearing made no such claim, and offered no evidence to establish that the strike had any purpose other than, or in addition to, that claimed by the General Counsel." 103 N. L. R. B., at 560.

These were adopted by the Board, *id.*, at 511-512, and confirmed by the Court of Appeals, 214 F. 2d, at 465 [26 LABOR CASES ¶ 68,584].

[5] 103 N. L. R. B., at 560 and 512, n. 2.

tioned § 8(d).[6] The Carpenters met several times with petitioners and pressed their demands for changes in the contract but the expiration date passed without any agreement being reached.

[6] "Sec. 8. . . .

* * *

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That *where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—*

"(1) *serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof,* or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) *continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days* after such notice is given or until the expiration date of such contract, whichever occurs later:

"The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the

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In January 1951, the Carpenters initiated the present proceedings before the National Labor Relations Board by charging petitioners with unfair labor practices. Acting on those charges, the Board's general counsel filed a complaint alleging petitioners' support of Local 318 and discharge of numerous employees, including Ciccone, as violations of § 8(a)(1), (2) and (3) of the Act.[7]

Petitioners admitted that they had discharged the employees in question and had not rehired them. They denied, however, that in so doing they had committed any unfair

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employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. *Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute,* for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer." (Italics supplied except for the word *"Provided."*) 61 Stat. 140, 142-143, 29 U. S. C. § 158(d).

[7] "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ." 61 Stat. 140, 29 U. S. C. §§ 157, 158(a)(1), (2) and (3).

labor practices. Their first affirmative defense was that the waiver of the right to strike, expressed by their employees in their collective-bargaining contract, applied to strikes not only for economic benefits but to any and all strikes by such employees, including strikes directed solely against unfair labor practices of the employer.

Petitioners' other principal defense was that the existing strike began during the statutory waiting period initiated by the employees' request for modification of the contract and that, by virtue of § 8(d) of the Act,[8] the strikers had lost their status as employees. That defense turned upon petitioners' interpretation of § 8(d), applying it not only to strikes for economic benefits but to any and all strikes occurring during the waiting period, including strikes solely against unfair labor practices of the employer.

The trial examiner made findings of fact sustaining the complaint and recommended that petitioners be ordered to cease and desist from the interference complained of and be required to offer to Ciccone and the 76 other discharged employees full reinstatement, together with back pay for Ciccone from November 10, 1950, and for the other employees from March 9, 1951. See 103 N.L.R.B. 511, 526-563. With minor modifications, the Board adopted the examiner's findings and conclusions and issued the recommended order. 103 N.L.R.B. 511. The chairman and one member dissented in part.

The Court of Appeals, with one judge dissenting in part, accepted the Board's findings of fact and conclusions of law and enforced the Board's order. 214 F. 2d 462 Since then, the Court of Appeals for the Seventh Circuit has reached a similar conclusion. *Labor Board* v. *Wagner Iron Works,* 220 F. 2d 126. Because of the importance of the issues in industrial relations and in the interpretation of the National Labor Relations Act, as amended, we granted certiorari. 348 U. S. 910.

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[8] See note 6, *supra.*

Apart from the issues raised by petitioners' affirmative defenses, the proceedings reflect a flagrant example of interference by the employers with the expressly protected right of their employees to select their own bargaining representative. The findings disclose vigorous efforts by the employers to influence and even to coerce their employees to abandon the Carpenters as their bargaining representatives and to substitute Local 318. Accordingly, unless petitioners sustain at least one of their affirmative defenses, they must suffer the consequences of their unfair labor practices violating § 8(a)(1), (2) or (3) of the Act, as amended.

In the absence of some contractual or statutory provision to the contrary, petitioners' unfair labor practices provide adequate ground for the orderly strike that occurred here. Under those circumstances, the striking employees do not lose their status and are entitled to reinstatement with back pay, even if replacements for them have been made.* Failure of the Board to enjoin petitioners' illegal conduct or failure of the Board to sustain the right to strike against that conduct would seriously undermine the primary objectives of the Labor Act. See *Labor Board* v. *Rice Milling Co.*, 341 U. S. 665, 673 [19 LABOR CASES ¶ 66,346]. While we assume that the employees, by explicit contractual provision, could have waived their right to strike against such unfair labor practices and that Congress, by explicit statutory provision, could have deprived strikers, under the circumstances of this case, of their status as employees,

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* Before the 1947 amendments to the National Labor Relations Act, see *Labor Board* v. *Poultrymen's Service Corp.*, 138 F. 2d 204, 210; *Labor Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927-928; *Labor Board* v. *Moore-Lowry Flour Mills Co.*, 122 F. 2d 419, 426; *Ritzwoller Co.* v. *Labor Board*, 114 F. 2d 432, 437; *Labor Board* v. *Sunshine Mining Co.*, 110 F. 2d 780, 792; *Labor Board* v. *Boss Manufacturing Co.*, 107 F. 2d 574, 579; *Labor Board* v. *Carlisle Lumber Co.*, 99 F. 2d 533, 535; *Labor Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 871. Since the 1947 amendments, see *Labor Board* v. *West Coast Casket Co.*, 205 F. 2d 902, 907-908; *Labor Board* v. *Kobritz*, 193 F. 2d 8, 16-17.

the questions before us are whether or not such a waiver was made by the Carpenters in their 1949-1950 contract and whether or not such a deprivation of status was enacted by Congress in § 8(d) of the Act, as amended in 1947.

I. *Does the collective-bargaining contract waive the employees' right to strike against the unfair labor practices committed by their employers?* The answer turns upon the proper interpretation of the particular contract before us. Like other contracts, it must be read as a whole and in the light of law relating to it when made.

In the National Labor Relations Act—

> "we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other." *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797, 806.

This contract was made in the light of that declared policy. The same dual purpose is emphasized as follows in § 1 of the National Labor Relations Act, as amended:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 61 Stat. 137, 29 U. S. C. § 151.

See also, the declaration of policy in § 1(b) of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. § 141(b).

The two policies are complementary. They depend for their foundation upon assurance of "full freedom of association." *Only after that is assured* can the parties turn to effective negotiation as a means of maintaining "the normal flow of commerce and . . . the full production of articles and commodities. . . ." 61 Stat. 136, 129 U. S. C. § 141(b).

On the premise of fair representation, collective-bargaining contracts frequently have included certain waivers of the employees' right to strike and of the employers' right to lockout to enforce their respective economic demands during the term of those contracts. *Provided the selection of the bargaining representative remains free,* such waivers contribute to the normal flow of commerce and to the maintenance of regular production schedules. Individuals violating such clauses appropriately lose their status as employees.[10]

The waiver in the contract before us, upon which petitioners rely, is as follows:

> "5. The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production of work by any of its members. The Union further agrees to refrain

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[10] See *Dyson & Sons,* 72 N. L. R. B. 445, 457; *Scullin Steel Co.,* 65 N. L. R. B. 1294, enforced as modified, 161 F. 2d 143. While these cases were decided under the Act before its 1947 amendments, there is nothing in the amendments to suggest their subsequent inapplicability. Both are referred to with approval in the House Conference Report on the 1947 amendments. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 39. See also, 93 Cong. Rec. 6442. But see *National Electric Products Corp.,* 80 N. L. R. B. 995, distinguished by the Board in the instant case, 103 N. L. R. B., at 514.

from engaging in any strike or work stoppage during the term of this agreement."

That clause expresses concern for the continued operation of the plant and has a natural application to strikes and work stoppages involving the subject matter of the contract.

Conceding that the words "in any strike or work stoppage during the [one-year] term of this agreement," if read in complete isolation, may include all strikes and work stoppages of every nature, yet the trial examiner, the Board and the Court of Appeals agree that those words do not have that scope when read in their context and in the light of the law under which the contract was made. This unanimity of interpretation is entitled to much weight.[11]

Petitioners argue that the words "any strike" leave no room for interpretation and necessarily include all strikes, even those against unlawful practices destructive of the foundation on which collective bargaining must rest. We disagree. We believe that the contract, taken as a whole, deals solely with the economic relationship between the employers and their employees.[12] It is a typical collective-

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[11] While two members of the Board and one of the Court of Appeals disagreed with their respective majorities as to petitioners' defense based upon § 8(d), no member of either body has expressed a dissent from the Board's interpretation of the contract.

[12] The preamble states that "the parties hereto desire to enter into an agreement relating to the rates of pay, hours of work and other conditions of employment which will provide methods of harmonious co-operation between the Employers and their employees and to that end accomplish fair and peaceful adjustments which may arise without interruption of the Employers' businesses . . ."

The balance of the contract relates to: (1) Limitation of employment to union members in good standing; definitions of exempt employees and union shop; (2) Availability of arbitration, under § 19, in disputes as to failures to maintain union memberships; (3) Checkoff of union dues; (4) Exempt employees and new employees;

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bargaining contract dealing with terms of employment and the normal operations of the plant. It is for one year and assumes the existence of a lawfully designated bargaining representative. Its strike and lockout clauses are natural adjuncts of an operating policy aimed at avoiding interruptions of production prompted by efforts to change existing economic relationships. The main function of arbitration under the contract is to provide a mechanism for avoiding similar stoppages due to disputes over the meaning and application of the various contractual provisions.

To adopt petitioners' all-inclusive interpretation of the clause is quite a different matter. That interpretation would eliminate, for the whole year, the employees' right to strike, even if petitioners, by coercion, ousted the employees' lawful bargaining representative and, by threats of discharge, caused the employees to sign membership cards in a new union. Whatever may be said of the legality of such a waiver when explicitly stated, there is no ade-

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(5) Strike waiver as quoted in text; (6) Lockout waiver as follows: "The Employers agree that there shall be no lockout during the term of this agreement"; (7) Arbitration, under § 19, to determine whether a strike, work stoppage or lockout has actually occurred; (8) Probationary periods for new employees; (9) Employers to have control over plant production and business requirements resulting in layoffs, furloughs or intra-plant transfers; (10) Employee seniority; (11) Hours of work; (12) Work weeks and extra shifts; (13) Rest periods; (14) Overtime; (15) Holidays; (16) Rates of pay and wage incentives; (17) Contract not to be interpreted so as to reduce wages, standards or working conditions; (18) Union officers who are active employees and union stewards governed by plant rules; (19) (a) Disputes as to meaning and application of the contract are subject to arbitration; (b) Rights of employees to present grievances to their employers are assured; (20) Notice of work days; (21) Vacations; (22) Employers' rights to manage plant and to discharge employees "for proper cause" preserved; union to cooperate with employers in interest of employee efficiency; (23) A specific wage increase is prescribed in lieu of an increase recently awarded by arbitration; (24) Effective December 1, 1949—November 30, 1950, with 60-day notice of intention to modify or terminate, and in such event "negotiations shall be promptly started."

quate basis for implying its existence without a more compelling expression of it than appears in § 5 of this contract.

There has been no court decision called to our attention which has held that the employees' right to strike against unfair labor practices has been waived by language such as that which is before us. On the other hand, prior to such contract such language had been held by the Board to apply appropriately to economic strikes with consequent loss of employee status.[13]

It is suggested that § 13 of the Act, as amended, precludes reliance by the Board upon the Act for support of its interpretation of the strike-waiver clause. That section provides that

> "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 61 Stat. 151, 29 U. S. C. § 163.

On the basis of the above language, petitioners claim that because the contract-waiver clause prohibits all strikes of every nature, nothing in the Act may be construed to affect the "limitations or qualifications" which the contract thus places on that right. Such a claim assumes the point at issue. The Board relies upon the context of the contract and upon the language of the clause itself, rather than upon the statute, to define the kind of strike that is waived.

As a matter of fact, the initial provision in § 13 that nothing in the Act "shall be construed so as either to interfere with or impede or diminish in any way the right to strike" adds emphasis to the Board's insistence upon preserving the employees' right to strike to protect their freedom of concerted action. Inasmuch as strikes against unfair labor practices are not anywhere specifically excepted

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[13] See note 10, *supra*.

from lawful strikes, § 13 adds emphasis to the congressional recognition of their property.[14]

For the reasons stated above and those given by the Board and the court below, we conclude that the contract did not waive the employees' right to strike solely against the unfair labor practices of their employers.

II. *Does § 8(d) of the National Labor Relations Act, as amended, deprive individuals of their status as employees if, within the waiting period prescribed by § 8(d)(4), they engage in a strike solely against unfair labor practices of their employers?* Here again the background is the dual purpose of the Act (1) to protect the right of employees to be free to take concerted action as provided in §§ 7 and 8(a),[15] and (2) to substitute collective bargaining for economic warfare in securing satisfactory wages, hours of work and employment conditions. Section 8(d)[16] seeks to bring about the termination and modification of collective-bargaining agreements without interrupting the flow of commerce or the production of goods, while §§ 7 and 8(a) seek to insure fredom of concerted action by employees at all times.

The language in § 8(d) especially relied upon by petitioners is as follows:

> "Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended. . . ." 61 Stat. 143, 29 U. S. C. § 158(d).

Petitioners contend that the above words must be so read that employees who engage in any strike, regardless

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[14] See *Labor Board* v. *Rice Milling Co.*, 341 U. S., at 673.

[15] See note 7, *supra*.

[16] See note 6, *supra*.

of its purpose, within the 60-day waiting period, thereby lose their status as employees. That interpretation would deprive Ciccone and his fellow strikers of their rights to reinstatement and would require the reversal of the judgment of the Court of Appeals.[17] If the above words are read in complete isolation from their context in the Act, such an interpretation is possible. However, "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States* v. *Boisdore's Heirs,* 8 How. 113, 122. See also, *Peck* v. *Jenness,* 7 How. 612, 622-623; *Duparquet Co.* v. *Evans,* 297 U. S. 216, and *United States* v. *American Trucking Assns.,* 310 U. S. 534, 542-543.

Reading the clause in conjunction with the rest of § 8, the Board points out that "the sixty-day period" referred to is the period mentioned in paragraph (4) of § 8(d). That paragraph requires the party, giving notice of a desire to *"terminate or modify"* such a contract, as part of its obligation to bargain under § 8(a)(5) or § 8(b)(3), to continue "in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later." Section 8(d) thus seeks, during this natural renegotiation period, to relieve the parties from the economic pressure of a strike or lockout in relation to the subjects of negotiation. The final clause of § 8(d) also warns employees that, if they join a proscribed strike, they shall thereby lose their status as employees and, consequently, their right to reinstatement.

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[17] Although the notice required to put the 60-day waiting period into operation in this case was not delivered until 51 days before the expiration of the contract, it was dated more than 60 days before such expiration date and it has been treated by all concerned as putting the waiting period into effect.

The Board reasons that the words which provide the key to a proper interpretation of § 8(d) with respect to this problem are "termination or modification." Since the Board expressly found that the instant strike was *not to terminate or modify* the contract,[18] but was designed instead to protest the unfair labor practices of petitioners, the loss-of-status provision of § 8(d) is not applicable. We sustain that interpretation. Petitioners' construction would produce incongruous results. It concedes that prior to the 60-day negotiating period, employees have a right to strike against unfair labor practices designed to oust the employees' bargaining representative, yet petitioners' interpretation of § 8(d) means that if the employees give the 60-day notice of their desire to modify the contract, they are penalized for exercising that right to strike. This would deprive them of their most effective weapon at a time when their need for it is obvious. Although the employees' request to modify the contract would demonstrate their need for the services of their freely chosen representative, petitioners' interpretation would have the incongruous effect of cutting off the employees' freedom to strike against unfair labor practices aimed at that representative. This would relegate the employees to filing charges under a procedure too slow to be effective. The result would unduly favor the employers and handicap the employees during negotiation periods contrary to the purpose of the Act. There also is inherent inequity in any interpretation that penalizes one party to a contract for conduct induced solely by the unlawful conduct of the other, thus giving advantage to the wrongdoer.[19]

Petitioners contend that, unless the loss-of-status clause is applicable to unfair labor practice strikes, as well as to economic strikes, it adds nothing to the existing law relating to loss of status. Assuming that to be so, the clause

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[18] See note 4, *supra*.

[19] See Note, 53 Col. L. Rev. 1023, 1025.

is justifiable as a clarification of the law and as a warning to employees against engaging in economic strikes during the statutory waiting period. Moreover, in the face of the affirmative emphasis that is placed by the Act upon freedom of concerted action and freedom of choice of representatives, any limiation on the employees' right to strike against violations of §§ 7 and 8(a), protecting those freedoms, must be more explicit and clear than it is here in order to restrict them at the very time they may be most needed.

There is sufficient ambiguity here to permit consideration of relevant legislative history. While such history provides no conclusive answer, it is consistent with the view taken by the Board and by the Courts of Appeals for the Second and Seventh Circuits.[20]

Senator Ball, who was a manager for the 1947 amendments in the Senate and one of the conferees on the bill, stated that § 8(d) made mandatory what was already good practice and was aimed at preventing such interruptions of production as the "quickie strikes" occasionally used to gain economic advantages.

> "The provision in the National Labor Relations Act defining collective bargaining, and providing that where a contract between a union and an employer is in existence, fulfilling the obligation on both sides to protect [bargain] collectively means giving at least 60 days' notice of the termination of the contract, or of the desire for any change in it, is another provision aimed primarily at protecting the public, as well as the employee, who have been the victims of 'quickie' strikes. I do not think that is taking away any rights

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[20] With the exception of one suggestion in a minority report, which is discussed elsewhere, the relevant committee reports describe the provisions of § 8(d) as being applicable to economic strikes and do not suggest their applicability to strikes against unfair labor practices in violation of §§ 7 and 8(a). S. Rep. No. 105, 80th Cong., 1st Sess. 24; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 34-35.

of labor . . . it is simply saying that they should all follow the sound, fair, and same procedure which a majority of the good ones now follow." 93 Cong. Rec. 5014.

One minority report suggested a fear that § 8(d) would be applicable to unfair practice strikes. The suggestion, however, was not even made the subject of comment by the majority reports or in the debates.[21] An unsuccessful minority cannot put words into the mouths of the majority and thus, indirectly, amend a bill.[22]

The record shows that the supporters of the bill were aware of the established practice which distinguished between the effect on employees of engaging in economic strikes and that of engaging in unfair practice strikes.[23] If Congress had wanted to modify that practice, it could readily have done so by specific provision. Congress cannot fairly be held to have made such an intrusion on employees' rights, as petitioners claim, without some more explicit expression of its purpose to do so than appears here.[24]

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[21] S. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess. 21-22; 93 Cong. Rec. 6385, 4036, 6503.

[22] "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 394-395, and see *Camp* v. *Labor Board*, 160 F. 2d 519, 521.

[23] ". . . to hold that a worker who because of an unfair labor practice has . . . gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby." S. Rep. No. 573, 74th Cong., 1st Sess. 6-7.

[24] For example, Senator Ball proposed an amendment, to the definition of "employee" in § 2(3) of the Act, which unintentionally might have abrogated the distinction which favored the employees' right to engage in unfair practice strikes as against economic strikes, but at once withdrew the amendment as going "too far," when this possible effect of it was brought to his attention. 93 Cong. Rec. 1827-1828.

Finally, petitioners seek support for their interpretation of § 8(d) from the fact that its last clause makes a cross-reference to §§ 8, 9 and 10 of the Act. Such reference does not expand the scope of § 8(d). It merely makes it clear that *if* § 8(d) is violated by the employees to which it applies, then they lose their status as employees for the purposes of §§ 8, 9 and 10.[25]

As neither the collective-bargaining contract nor § 8(d) of the National Labor Relations Act, as amended, stands in the way, the judgment of the Court of Appeals is *Affirmed.*

FRANKFURTER, J., joined by MINTON and HARLAN, JJ., dissenting: The petitioners are corporations in the plastics manufacturing business in New York and are subject to the Taft-Hartley Act, 61 Stat. 136. In November, 1949, they negotiated a one-year collective bargaining agreement with the Carpenters Union, A.F.L., governing wages, hours and working conditions. The agreement provided for the arbitration of disputes and contained a clause outlawing strikes. During the life of this agreement, the Wholesale and Warehouse Workers Union commenced the solicitation of members among petitioners' employees, and in September, 1950, requested the National Labor Relations Board to certify them as exclusive bargaining representative.

In an effort to keep the Warehouse Workers out of their plant, the petitioners enlisted the aid of a third union, the Pulp and Mill Workers. This latter organization had bested the Wholesale and Warehouse Workers elsewhere in organizational wars. Petitioners proselytized among their employees on behalf of the Pulp and Mill Workers, which in late October, having gained sufficient adherents, intervened in the representation proceeding initiated before the Board by the Warehouse Workers.

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[25] See H. R. Rep. No. 245, 80th Cong., 1st Sess. 27; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 38-39.

Meanwhile the Carpenters had written petitioners on October 10, stating that they wished to negotiate a new contract to take effect upon the expiration of the current agreement. The letter made specific demands, and bargaining over them followed. When the petitioners' organizational activities became manifest, the Carpenters lodged unfair-labor-practice charges with the Board. Some members of the incumbent union tried to counteract the influence of the petitioners upon the employees. Frank Ciccone, a machinist, was one who was active in urging employees to remain loyal to the Carpenters.

On November 10, Ciccone was discharged because of this. The discharge, in conjunction with the antecedent employer unfair labor practices, precipitated a plant-wide strike accompanied by peaceful picketing. The strike continued until early February when the participants requested reinstatement. The request was rejected by the petitioners which had earlier notified the strikers of their discharge.

The proceedings before the Board that followed resulted in findings against the employers of unfair labor practices under § 8(a)(1), (2) and (3). The Board entered a cease and desist order, and affirmatively directed petitioners to reinstate the discharged strikers with back pay. 103 N. L. R. B. 511. Chairman Herzog and Member Murdock dissented from the latter portion of the Board's order. The Court of Appeals for the Second Circuit (Swan, J., dissenting in part) enforced the Board's order. 214 F. 2d 462. We granted certiorari because of the important question of the construction of the Taft-Hartley Act raised by the case. 348 U. S. 910.

Petitioners did not contend in the Court of Appeals, nor have they argued here, that the Board erred either in finding them guilty of committing unfair labor practices, or in concluding that the strike was precipitated by these illegal practices. Rather they maintain that the Board lacked the power to order the discharged strikers rein-

stated. Two reasons are urged. First, the strike is claimed to constitute a breach of the labor agreement between petitioners and the bargaining representative of the strikers, and was therefore unprotected activity. Such is not the case. The Board and the Court of Appeals rightly held that the "no-strike" clause in the contract does not cover a work-stoppage provoked by the petitioners' unfair labor practices. The second reason is that the strikers ceased to be employees within the meaning of the Act, and therefore were not entitled to reinstatement. Petitioners contend that the discharged workers lost their status as employees by reason of the 60-day "cooling-off" period provided by § 8(d) of the Act.

Section 8(d) defines the duty of the employer and the union to bargain collectively. A long proviso in the section treats specifically of the duty during the period of contract renegotiation. The relevant portions of the section follow:

> ". . . where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> "(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> . . .
>
> "(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: . . . Any employee who engages in a strike within the sixty-day

> period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

The discharged employees struck during the 60-day period, for the notification required by § 8(d)(1) was given on October 10, and the strike began on November 10. The holding of the Board, however, sustained by the Court of Appeals, is that the loss-of-status provision does not apply to an unfair-labor-practice striker.

This provision was one of the amendments to the Wagner Act made by the Labor Management Relations Act, 61 Stat. 136. If the provision, couched in ordinary nontechnical language, is to be read as ordinary English words, concededly the striking employees lost their "status" as employees of petitioners "for the purposes of sections 8, 9, and 10 . . ." Accordingly they were not entitled to reemployment by the petitioners, and the Board was without authority to order their reinstatement. The real problem, then, is to determine whether controlling considerations preclude giving the ordinary meaning to what Congress has written. While literalness of construction does not conclude ascertainment of a statute's meaning, it certainly is the beginning.

The so-called canons of construction are not technical rules of law which afford the answer to a problem like this. But they are "axiom[s] of experience" (*Boston Sand and Gravel Co.* v. *United States*, 278 U. S. 41, 48), helpful guides in determining when language as plain as ours should be respected and enforced. Relevant guides in construing an amendatory provision like the one in issue are: (1) what was the state of the law before the amendment and (2) what light is shed on the specific provision by placing it in the context of the legislation, *i.e.*, the Taft-

Hartley Act, of which it is a part, in order to secure harmony and not discord of result. In a word, enactments like the Wagner Act and the Taft-Hartley Act must be considered as an organic whole.

Under the original Wagner Act, employees were given the right in § 7 "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." Duties were imposed upon the employer under § 8. Among these, he could not interfere with the exercise by employees of their rights under § 7, and he was required to bargain in good faith with the employees' representative. When the Board found that an employer had violated his duty under § 8, it was empowered under § 10 to order the employer to cease and desist from so doing and to take action undoing his violation, including the reinstatement of discharged employees, if such reinstatement would effectuate the policies of the Act.

While the employer had numerous obligations to his employees and their bargaining representative, the union and the employees were under no statutory duty to the employer. For example, the union was not required to bargain in good faith, and it was not forbidden to strike in order to achieve its demands during a period of contract renegotiation.

If this case had come up under the Wagner Act the results would be clear. The employers violated § 8 and thereby unleashed the strike. Such a strike would not have been in violation of any statutory duty because the union and the employees had no duties under the Wagner Act. Since the employers had committed an unfair labor practice the Board had jurisdiction, and could order the discharged strikers reinstated with back pay. *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177. Furthermore, the employers' discharge of their employees because they

engaged in a strike was itself an unfair labor practice under § 8 for it interfered with their § 7 right to engage in "concerted activities."

The Wagner Act did not define "concerted activities." All collective action, however, was not concerted activity protected by § 7. We held in *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, that a sit-down strike was not § 7 activity; and in *Southern S. S. Co.* v. *Labor Board*, 316 U. S. 31, we decided that a strike in violation of the laws against mutiny was not protected under § 7. If an employer interferes with collective employee action which is not sanction by § 7, he does not violate § 8, and in the absence of a violation of § 8 the Board cannot take action under § 10. Thus if an employer discharges workers because they engaged in a sit-down strike for higher wages, the Board cannot order him to reinstate the strikers. Since § 8, however, did not place any duties upon employees or unions, most peaceful collective action was protected under § 7, because most peaceful activity did not infringe some implicit federal labor policy or some other federal policy, such as that represented by the statute against mutiny.

The Taft-Hartley Act changed the situation. Section 8 of the Wagner Act was amended and duties were placed upon unions. Collective action which violates any of these duties is of course activity unprotected by § 7. See Cox, The Right to Engage in Concerted Activities, 26 Ind. L. J., 319, 325-333 (1951). One of these new union duties, and an important one, is contained in § 8(d): unions may not strike to enforce their demands during the 60-day "cooling-off" period.

By reason of this new enactment, participating workers would not be engaged in a protected activity under § 7 by striking for the most legitimate economic reasons during the 60-day period. The strike would be in violation of the provision of that section which says that during the period there shall be no resort to a strike. The employer could discharge such strikers without violating § 8. This

would be so if § 8 were without the loss-of-status provision. The Board would be powerless to order reinstatement under § 10. The loss-of-status provision in § 8(d) does not curtail the Board's power, since it did not have power to order reinstatement where a strike is resorted to for economic reasons but before the 60-day period has expired. In such a situation the striker has no rights under §§ 8 and 10. Yet the Board would have us construe the loss-of-status provision as applicable only to the economic striker and qualifying a power which the Board does not have.

It is with respect to the unfair-labor practice striker that the provision serves a purpose. This becomes clear if we assume that there were no such provision and examine the consequences of its absence. On such an assumption, a strike based on an unfair labor practice by the employer during the 60-day period may or may not be a protected activity under § 7. If it is, obviously discharged strikers would be entitled to reinstatement. The strike would not be a § 7 activity however, if, for example, it were in breach of a no strike clause in the contract which extends to a work stoppage provoked by an employer unfair-labor-practice, cf. *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 344, or if the no strike clause in § 8(d)(4) (not to be confused with the loss-of-status provision) extends to such a work stoppage. However, even if the strike is not a § 7 activity, the Board in the unfair-labor-practice strike situation as distinguished from the economic strike situation, may in its discretion order the discharged participants reinstated. This is so because of the antecedent employer unfair practice which caused the strike, and which gave employees rights under § 8. If the Board finds that reinstatement of such strikers is a remedy that would effectuate the policies of the Act, it has the power under § 10(c) to issue the necessary order.

This would not be the case, however, if the loss-of-status provision were held applicable to unfair-labor-practice strikes, because participating workers would lose their

rights as "employees" for the purpose of §§ 8 and 10. Under the Act only "employees" are eligible for reinstatement. The unfair-labor-practice strike, then, is the one situation where loss of status for the purposes of §§ 8 and 10 is of significance. At any rate, we have not been advised of any other situation to which the provision would apply.

We are therefore confronted with the demonstrable fact that if the provision stripping strikers of their status as employees during the 60-day period is to have any usefulness at all and not be an idle collection of words, the fact that a strike during that period is induced by the employer's unfair labor practice is immaterial.* Even though this might on first impression seem an undesirable result, it is so only by rejecting the important considerations in promoting peaceful industrial relations which might well have determined the action of Congress. In the first place, the Congress may have set a very high value on peaceful adjustments, *i.e.*, the absence of strikes. One may take judicial notice of the fact that this consideration was at the very forefront of the thinking and feeling of the Eightieth Congress. And there is another consideration not unrelated to this. While in a particular case the cause of a strike may be clear, and in a particular case there may be no controversy regarding the circumstances which prove that an employer committed an unfair labor practice, as a matter of experience that is not always true, indeed often it is not true. One of the sharpest controversies, one of the issues most difficult of determination, is the very question of what precipitated a work stoppage. This is especially true where a new contract is being negotiated. It is not at all unreasonable, therefore, to find a congressional desire to preclude litigation over what all too often is a contentious subject and to deter all strikes during the crucial period of negotiation.

We need not agree with a legislative judgment in order to obey a legislative command. It is enough for us that

Congress did not legislate idly, but did intend the loss-of-status provision to have an effect.

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each." *Market Co.* v. *Hoffman,* 101 U. S. 112, 115-116.

Since the loss-of-status provision has an effect only in an unfair-labor-practice strike, the judgment of the Court of Appeals should be reversed.

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* It may be noted that the opponents of the Taft-Hartley Act objected to the loss-of-status provision for just this reason:

"[T]he section is silent as to the Board's authority to accommodate conflicting issues such as provocation on the part of the employer. Under this section an employer desirous of ridding himself either of the employees or their representative can engage in the most provocative conduct without fear of redress except by way of a lengthy hearing before the Board and a subsequent admonition to thereafter 'cease and desist' from such practices. In striking contrast to the relatively delicate treatment provided for such action by an employer, employees unwilling idly to countenance abuse, who resort to self-help under the circumstances are removed from the protection of the statute and lose 'employee' status. An employer is at liberty under such circumstances freely to replace any employee bold enough to insist upon justice. The provision denies to the Board the exercise of any discretion to accommodate the equitable doctrine of 'clean hands.' The provisions of the section are conclusive—the employee is subject to summary dismissal irrespective of the employer's conduct." Sen. Rep. No. 105 (Minority), part 2, 80th Cong., 1st Sess. 21-22 (1947).

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes, rules and regulations involved	2
Statement	2
Argument	6
Conclusion	11
Appendix	12

CITATIONS

Cases:	
Mastro Plastics v. *National Labor Relations Board*, 350 U.S. 270	2, 10
Nabors, W. C., 134 NLRB 1078	9
Nabors v. *National Labor Relations Board*, 323 F. 2d 689, certiorari denied, 376 U.S. 911	8
National Labor Relations Board v. *Brown & Root, Inc.*, 311 F. 2d 447	6, 8
National Labor Relations Board v. *Charley Toppino & Sons*, 61 LRRM 2655	8
National Labor Relations Board v. *Ellis and Watts Products*, 344 F. 2d 67	8
National Labor Relations Board v. *Kartarik, Inc.*, 227 F. 2d 190	8
Wirtz v. *Baldor Electric Co.*, 48 Labor Cases ¶ 31,518, 50 Labor Cases ¶ 31,603	9
Statutes:	
Administrative Procedure Act, Section 7(c) (5 U.S.C. 1006(c))	9
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 8(d)	10, 11
Section 10(c)	6
Walsh-Healey Act, 41 U.S.C. 35–45	10
Miscellaneous:	
National Labor Relations Board Rules and Regulations, Series 8, as amended (29 C.F.R. 102.52, *et seq.*)	3, 12, 13, 14

218-502—66

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1245

MASTRO PLASTICS CORPORATION AND FRENCH AMERICAN REEDS MANUFACTURING COMPANY, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 42–59) is reported at 354 F. 2d 170. The Board's Supplemental Decisions and Orders (R. 6a–134a, 135a–152a)[1] are reported at 136 NLRB 1342 and 145 NLRB 1710.

JURISDICTION

The Supplemental Decree of the court of appeals (Pet. 37–41) was entered on January 5, 1966. On March 29, 1966, Mr. Justice Harlan extended the time in which to file a petition for a writ of certiorari to

[1] "R." refers to the appendix to petitioners' brief in the court below.

and including April 25, 1966, and the petition was filed on April 22, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a proceeding to assess the amounts of back pay due employees against whom the employer has discriminated in violation of the National Labor Relations Act, the burden of producing evidence showing whether or not jobs would have been available to particular employees during the relevant period rests upon the employer or the Board.

2. Whether the Board properly awarded back pay for the period prior to the decision of this Court in *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270 (1956), which sustained the Board's finding of unlawful discrimination.

STATUTES, RULES AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and the Administrative Procedure Act (5 U.S.C .1001, *et seq.*) are set forth at pp. 4–7 of the petition. The relevant portions of the National Labor Relations Board Rules and Regulations are set forth in the Appendix, *infra*, pp. 12–14.

STATEMENT

On March 13, 1953, the Board issued a Decision and Order (103 NLRB 511), finding that petitioners ("the Company") had discriminatorily discharged employee Frank Ciccone and had unlawfully refused to reinstate 76 other employees who had struck over the un-

fair labor practice against Ciccone. The Board ordered the Company to offer Ciccone and the striking employees "full reinstatement to their former or substantially equivalent positions" and to make them whole "for any loss of pay they may have suffered by reason of the [Company's] discrimination against them" (103 NLRB at 519–520). The court of appeals enforced the Board's order (214 F. 2d 462), and this Court affirmed. 350 U.S. 270 (Pet. 60–86).

After the Company offered reinstatement to all of the employees against whom discrimination had been practiced, efforts were made to negotiate the back pay question informally (R. 6a–7a, 24a–25a). These efforts proved unsuccessful, and, on June 14, 1960, the Board's Regional Director issued a back pay specification as provided in the Board's regulations.[2] This detailed specification (see R. 153a–158a, 22a), which was over 150 pages in length,[3] computed the weekly gross back pay due each employee for each week of the back pay period by multiplying the average hours worked during each week by persons actually employed in the plant at that time (the incumbent employees) by the hourly wage rate in effect at the outset of the discrimination for each employee claim-

[2] See Secs. 102.52–59 of the Board's Rules and Regulations, set forth in the Appendix, *infra*, pp. 12–14.

[3] For most of the employees, the back pay period extended from March 12, 1951 (the Monday following the date, March 9, when the Company refused the strikers' unconditional application to return to work), to March 9, 1956 (when the Company offered reinstatement). 103 NLRB 511, 555, 563. Two of the strikers, however, were not offered reinstatement until later (R. 24a–25a).

ing back pay, adjusted for hourly rate increases that occurred thereafter. For the two weeks in the summer when the plant was substantially shut down, vacation pay was computed in accordance with the method by which vacation pay was computed for incumbent employees. The weekly figures were cumulated and, in addition, year-end bonuses were computed in accordance with the method by which such bonuses was paid to incumbent employees. From the gross back pay thus computed, the known interim earnings of each employee from other employment, less the expenses incurred in seeking such employment, were deducted. (R. 25a–26a, 153a–157a.)

The back pay specification was served on the Company, which filed an answer challenging its legal sufficiency, and the case proceeded to hearing before a Trial Examiner.[4] At the hearing, the Board's General Counsel placed the back pay specification in evidence. He then called as a witness each available employee as to whom discrimination had been found. These employees testified to the efforts made to seek other employment during the back pay period and the amount of earnings from such employment. The Company cross-examined the employees (R. 26a-27a). At the close of the General Counsel's case, the Company moved to dismiss the complaint on the ground that, since the General Counsel had failed to show

[4] The Trial Examiner found that the Company's amended answer, for the most part, admitted the accuracy of the mathematical calculations in the Board's specification, but challenged, *inter alia*, the assumption that jobs were available at all times during the back pay period for each employee who claimed back pay (R. 26a).

affirmatively that jobs at the plant would have been available for each employee during the back pay period, he had not established a *prima facie* case. The Trial Examiner overruled the motion, holding that it was for the Company to prove that jobs would have been unavailable for particular employees, if that was the fact. The Company rested on its motion and declined to adduce any evidence that jobs would, in fact, have been unavailable (R. 27a–28a).

The Trial Examiner concluded that 62 of the employees were entitled to back pay awards, ranging from $4.36 to $10,096.97. He further recommended that the back pay claimed in the Board's specification for 9 employees who did not testify be placed in escrow until they came forward and appeared at a second hearing[5] (R. 125a–128a). The Board adopted the findings and recommendations of the Trial Examiner with minor alterations. The Board also adopted the Trial Examiner's recommendation that the 9 awards be placed in escrow (R. 6a–22a).

In July, 1963, an additional hearing was held at which depositions for 7 of the 9 employees who had not appeared at the first hearing were placed in evidence. The Trial Examiner granted back pay to 8 of the 9 employees, including one who did not testify or submit a deposition (Isiah Smith) (R. 139a–151a). The Board adopted, again with minor alterations, the Trial Examiner's second decision (R. 135a–138a).

The Company petitioned the court of appeals to

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[5] The Trial Examiner listed 8 employees who had not testified, but the Board found that he had inadvertently omitted Michael Valentine (R. 13a, n. 14).

review the Board's back pay orders. The court enforced the Board's orders in full, except for the back pay award to Isiah Smith (Pet. 42–59).* The orders as enforced provide for a total payment of $153,609, to 69 claimants (Pet. 39–41).

ARGUMENT

1. Section 10(c) of the Act empowers the Board to award back pay to employees who have been the victims of discrimination. "The employee is entitled to receive what he would have earned normally during the period of the discrimination against him, less what he actually earned in other employment during that period." *National Labor Relations Board* v. *Brown & Root, Inc.*, 311 F. 2d 447, 452 (C.A. 8). In determining what an employee would normally have earned, a relevant factor is whether the employer would have had work available for him had the discrimination not occurred. The principal question presented by the petition in this case is whether the General Counsel or the employer has the burden of producing evidence relating to such job availability when that factor is in dispute.

The Board's position, sustained by the court of appeals, is that, when the employer raises the issue of the existence of jobs during the back pay period, the burden of producing evidence that a job would have been unavailable for any particular employee rests upon the employer. In the absence of such evidence,

* The court held that, since Smith had not appeared at the hearing and no unusual circumstances were shown to justify his failure to appear, the Board had failed in its duty of producing evidence with respect to his claim (Pet. 53).

the Board holds that it may assume that each of the employees claiming back pay would have worked during each week of the back pay period for the average number of hours actually worked by incumbent employees during that period. The Company, on the other hand, contends that the burden of establishing job availability for each employee is on the General Counsel who must show, as to each employee claiming back pay, the identity of the replacement of that employee (if, in fact, he was replaced), and the actual earnings of that replacement (Pet. 18–19). In the absence of such affirmative evidence for each employee, the Company contends that no back pay whatsoever may be awarded.

The court of appeals was clearly correct in sustaining the Board's view, which appropriately allocates the burden of producing evidence on the various relevant issues in a back pay dispute. As the court pointed out (Pet. 49), "[t]o establish that an employer has reduced or adjusted his business to an extent eliminating the job of a discriminatee requires careful analysis of the books and records of the employer during the back pay period. Of course, the Board has access to these records, but it is the employer who kept the records and who therefore is able to explain them and to interpret any ambiguities they may contain." Nor does the Company suggest any impracticability or unfairness in thus allocating the burden to it, rather than to the Board. The Board's rule, which assumes that claiming employees would normally have worked the same number of hours as the average time worked by incumbent employees if the

contrary does not appear, is reasonable and has been consistently approved by the courts of appeals. See, *e.g., National Labor Relations Board* v. *Kartarik, Inc.*, 227 F. 2d 190, 193 (C.A. 8); *National Labor Relations Board* v. *Brown & Root, Inc.*, 311 F. 2d 447, 452–453 (C.A. 8); *Nabors* v. *National Labor Relations Board*, 323 F. 2d 686, 690 (C.A. 5), certiorari denied, 376 U.S. 911; *National Labor Relations Board* v. *Charley Toppino & Sons*, 61 LRRM 2655, 2656–2657 (C.A. 5), March 24 1966; *National Labor Relations Board* v. *Ellis and Watts Products*, 344 F. 2d 67, 69 (C.A. 6).[7]

The Company contends that the Board's view leads to incongruous results by positing the following example (Pet. 18–19): It is assumed that there were 77 strikers, but that only 10 employees actually worked during a given week for a total of 400 hours, or an average of 40 hours per week for each man. In such a case, the Board's formula would claim back pay for 3,080 hours (77 multiplied by 40) notwithstanding that there were only 400 hours of actual work. The example given is, of course, an unreal one. There is no indication in the record that, in any of the quarters for which the Board computed

[7] Nor would it be correct automatically to deduct any job reductions during the back pay period—even if such reductions were shown—from the back pay due. Because of seniority, or other reasons, employees claiming back pay might well have been retained in preference to other employees, even though job reductions were effectuated. To reduce the back pay due, it must be shown that the particular employees claiming back pay would not have been employed had the discrimination not occurred.

back pay, there was such a great disparity between the number of employees claiming back pay and the number of employees who actually worked. However, if there had been such disparity between the Board's computation and the actual situation, the Company was entirely free under the Board's rule to establish that its operations had in fact declined during that period and that, had there been no discrimination, some or all of the employees claiming back pay would have been unemployed. If such a showing had been made, the Company would have been able to reduce the amount of back pay liability. See *W. C. Nabors,* 134 NLRB 1078, 1087–1091.

Finally, the Board's back pay formula is not contrary to Section 7(c) of the Administrative Procedure Act (5 U.S.C. 1006(c)). That section provides: "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." As the court of appeals correctly observed (Pet. 48), Section 7(c) was not intended "to disturb the traditional allocation of the burden of going forward between the parties to an adjudicative proceeding." It is therefore wholly consistent with Section 7(c) to say that the Company had the burden of alleging and proving affirmative defenses to the General Counsel's claim. The question is whether job unavailability was, in fact, an affirmative defense and, for the reasons set forth above, the Board and the court of appeals properly concluded that it was.[8]

[8] Nor is the decision below in conflict with *Wirtz* v. *Baldor Electric Co.*, 48 Labor Cases ¶ 31,518, 50 Labor Cases ¶ 31,603 (C.A.D.C.) (Pet. 26). There the Secretary of Labor sought

2. There is no inconsistency (see Pet. 28–30) between the holding of the court of appeals that, although the Company has the burden of producing evidence relating to job unavailability, the Board must, where its interim earnings figures are challenged, make the employees available so that they may testify and be cross-examined on the question of willful idleness. As the court below stated (Pet. 50), since "the Board presumably has some prior contact with available discriminatees when it computes 'net back pay due' for its specification, * * * it is more likely to know their whereabouts at the time of the hearing" and thus it is "fair to require that the Board make them available." Thus, similar considerations of appropriateness and fairness motivated both allocations of the burden—albeit to different parties.

3. The Company's remaining contention (Pet. 30–37) is that, since the literal terms of Section 8(d) of the Act appeared to privilege its action in discharging the strikers, it was unconstitutional to award back pay for the period between between the date of the discrimination (March, 1951) and the decision in *Mastro Plastics Corp.* v. *National Labor Relations*

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to justify certain minimum wages he had established under the Walsh-Healey Act (41 U.S.C. 35–45) on the basis of a wage survey made by the Bureau of Labor Statistics. The court held that the Secretary could not sustain his burden without revealing the names of the companies covered by the survey. No similar problem is presented here, for the Board has fully disclosed to the Company, in the back pay specification and through testimony at the hearing, all of the factors involved in the back pay computation.

Board, 350 U.S. 270 (February, 1956), where this Court held that the Company's action was, in fact, unlawful.[9] The court of appeals properly characterized this as a "frivolous contention." As the court stated (Pet. 44, n. 1), even "assuming § 8(d) is ambiguous, it is not unconstitutionally vague, and there is no policy against imposing 'retroactive' compensatory liability when a violation of a valid statutory duty causes economic injury to persons within the protective scope of the statute."

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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MAY 1966.

[9] The employees in the instant case went out on strike before expiration of the sixty-day period specified in Section 8(d) (Pet. 4–5). That section provides that any employee who does so "shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purpose of sections 8, 9, and 10 of [the] Act." This Court sustained the Board's view that the loss of status provision does not apply where, as here, the strike was provoked by serious unfair labor practices on the part of the employer (Pet. 60–86).

APPENDIX

The relevant portions of the National Labor Relations Board Rules and Regulations, Series 8 as amended, 29 CFR 102.52, *et seq.*, are as follows:

SEC. 102.52 *Initiation of proceedings; issuance of back-pay specification; issuance of notice of hearing without back-pay specification.*— After the entry of a Board order directing the payment of back pay or the entry of a court decree enforcing such a Board order, if it appears to the regional director that a controversy exists between the Board and a respondent concerning the amount of back pay due which cannot be resolved without a formal proceeding, the regional director may issue and serve upon all parties a back-pay specification in the name of the Board. The specification shall contain or be accompanied by a notice of hearing before a trial examiner at a place therein fixed and at a time not less than 15 days after the service of the specification. * * *

SEC. 102.53 *Contents of back-pay specification and of notice of hearing without specification.* (a) *Contents of back-pay specification.* Where the specification procedure is used, the specification shall specifically and in detail show, for each employee, the back-pay periods broken down by calendar quarters, and specific figures and basis of computation as to gross back pay and interim earnings, the expenses for each quarter, the net back pay due, and any other pertinent information.

* * * * *

SEC. 102.54 *Answer to specification; no requirement for answer to notice of hearing issued without back-pay specification.*

(a) *Filing and service of answer to specification.* The respondent shall, within 15 days

from the service of the specification, if any, file an answer thereto; an original and four copies shall be filed with the regional director issuing the specification, and a copy thereof shall immediately be served on any other respondent jointly liable.

(b) *Contents of the answer to specification.* The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross back pay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to the specification.* If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be

true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

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SEC. 102.55 *Extension of time for filing answer to specification.*—Upon his motion or upon proper cause shown by any respondent, the regional director issuing the specification may by written order extend the time within which the answer to the specification shall be filed.

SEC. 102.56 *Extension of date of hearing.*—Upon his own motion or upon proper cause shown, the regional director issuing the specification or notice of hearing without specification may extend the date of hearing.

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SEC. 102.58 *Withdrawal.*—Any such specification or notice of hearing without specification may be withdrawn before the hearing by the regional director on his own motion.

SEC. 102.59 *Hearing; posthearing procedure.*—After the issuance of a notice of hearing with or without back-pay specification, the procedures provided in sections 102.24 to 102.51, shall be followed insofar as applicable.

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